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THE UNIVERSITY OF ALBERTA

THE LAW OF INTERNATIONAL STRAITS AND INTEROCEANIC CANALS

by

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A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH
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FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled THE LAW OF INTERNATIONAL STRAITS AND INTEROCEANIC CANALS submitted by MORRIS F. MADURO, JR. in partial fulfilment of the requirements for the degree of Doctor of Philosophy.

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To Marietta

ABSTRACT

The international environment, particularly in the last decade, has been characterized by increasing populations and dwindling resources within a political framework of intense nationalism, especially on the part of the new and developing states. These elements have sparked a justifiable demand on the part of states for greater control over their coastal waters both for resource and security purposes. However, the legitimate need on the part of coastal states to exercise more extensive jurisdiction over these areas has clashed with the equally valid need on the part of other states to use these waters for unrestricted maritime communication, a clash which has threatened the fundamental principle of the freedom of the seas. The two types of maritime highway that have been the focus of much of this controversy are international straits and interoceanic canals.

International straits provide in most cases convenient and shorter routes for travel between two points, and in many cases the only means of access to and from an open sea. With the general extension of territorial seas to 12 nautical miles, some 116 straits of international importance will fall under coastal state sovereignty. Part One of this dissertation will analyze and describe the history, development, and present status of the law of international straits, placing emphasis on the conflicting demands — legal and political — of both "user states" and "strait states." A large part of this inquiry will center on a critical examination of the 1958 Territorial Sea Convention as it relates to straits, and on the recent efforts on the part of the Third United Nations Conference on the Law of the Sea to draft new rules governing these waterways.

Interoceanic canals have never been the object of regulation by general international convention as have straits. Nevertheless, controversy regarding the relative rights of both sovereign and user states over these maritime highways has been no less intense. Part Two of this dissertation will examine the history and present legal status of the three major interoceanic canals — Suez, Panama, and Kiel. Emphasis will be placed on an examination of their legal bases, state practice, and judicial decisions, in an effort to determine the extent to which there exist legally enforceable passage rights in favour of the world community, and whether there is justification for the claim that these canals are governed by a common body of law.

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TABLE OF CONTENTS

Page

GENERAL INTRODUCTION 1

PART ONE: INTERNATIONAL STRAITS

INTRODUCTION TO PART ONE 10

REFERENCES 15

CHAPTER

I THE GEOGRAPHIC NATURE OF STRAITS 16

- A. The Geographic Concept of Straits 16
- B. The Locational Aspects 16
- C. The Economic, Political, and Strategic Significance of Straits 17
  - 1. To Maritime Navigation 17
  - 2. To States Bordering Straits 21
- D. Straits and the Concept of Freedom of the Seas 25
- E. The Emergence of Vector Forces 26

REFERENCES 33

II THE LEGAL NATURE OF STRAITS 45

- A. The Position of Straits in International Law to 1945 45
  - 1. The Views of Publicists 45
    - a. 17th and 18th Century 45
    - b. 19th Century 48
    - c. Early 20th Century 51
  - 2. State Practice to 1945 54
    - a. Merchant Vessels 54
    - b. Warships 56

Page

B. The Position of Straits in International Law After 1945 58

1. The Corfu Channel Case 58

2. The International Law Commission and the First Law of the Sea Conference 61

3. The Views of Publicists after 1945 62

REFERENCES 67

III THE CONTEMPORARY LEGAL ASPECTS: THE LEGACY OF THE CORFU CHANNEL CASE AND THE 1958 CONVENTION 73

A. Coastal State Jurisdiction over the Territorial Sea in Areas Not Constituting Straits 73

B. Coastal State Jurisdiction over the Territorial Sea in Areas Constituting Straits 76

REFERENCES 83

IV THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 86

A. Background to the Conference 86

B. Straits: The Major Cleavages 90

C. The Composite Negotiating Text and Passage Through Straits 91

1. Transit Passage 91

2. Non-Suspendable Innocent Passage 96

3. Suspendable Innocent Passage 97

4. Innocent Passage Under the Composite Negotiating Text 99

5. Transit Passage v. Innocent Passage 104

6. Sea Lanes and Traffic Separation Schemes 106

7. Warships 110

8. Passage Through Archipelagos 111

9. Passage Through Straits Enclosing Non-Territorial Sea Areas: The Contiguous Zone and the Exclusive Economic Zone 116

Page

10. Extension of Coastal State Jurisdiction in Straits Wider Than - or Enclosing Sections Wider Than - The Breadth of Both Territorial Seas 121

REFERENCES 124

CONCLUSIONS TO PART ONE 131

APPENDIX TO PART ONE: STRAITS OF SIGNIFICANCE TO INTERNATIONAL NAVIGATION 139

PART TWO: INTEROCEANIC CANALS

INTRODUCTION TO PART TWO.......... 142

REFERENCES 145

CHAPTER

I HISTORICAL BACKGROUND: THE CONSTRUCTION AND LEGAL FOUNDATIONS 146

A. The Suez Canal 146

1. Construction to 1888: Legal Foundations 146

2. The Practice After 1888 151

B. The Panama Canal 159

1. 1846 to Construction: Legal Foundations 159

2. The Practice Under the Hay-Pauncefote and Hay-Bunau Varilla Treaties 167

C. The Kiel Canal 169

1. Construction to 1919 169

2. The Wimbledon Case 170

3. The Practice After 1923 172

REFERENCES 175

II A COMPARISON OF THE CONVENTIONS REGULATING THE THREE WATERWAYS: THE EXISTENCE OF A "CANAL REGIME".......... 184

REFERENCES 189

Page

III THE DETERMINANTS OF PASSAGE 191

A. The Rule *Pacta Tertiis Nec Nocent Nec Prosunt and the Creation of Third-Party Rights: The Stipulation Pour Autri* 191

B. Creation of a Legal Right by the Operation of Custom 197

C. Passage as a Servitude 201

D. Passage Rights as a Result of Dedication and Reliance 204

E. Passage Rights as a Result of a Unilateral Declaration 208

REFERENCES 211

IV THE DETERMINANTS OF PASSAGE (CONT.): NEUTRALIZATION ... 220

A. Removal from the Region of War 220

B. The *Wimbledon* Case and the Passage of Belligerent Warships 224

C. An Evaluation 226

REFERENCES 232

CONCLUSIONS TO PART TWO : AN INTERNATIONAL ADMINISTRATION? 238

REFERENCES 246

GENERAL CONCLUSIONS 248

* * *

BIBLIOGRAPHY 251

GENERAL INTRODUCTION

Of the three types of international waterways - straits, canals and rivers - this dissertation will focus on the first two. Though there are analogies that can be drawn between the three types of waterways, only straits and canals are interoceanic waterways that are regarded as vital passageways between larger bodies of water, and, hence, of significance to the international community as a whole. International rivers, on the other hand, are mainly of regional importance, and of primary significance to the respective riparian states. Their import rests mainly on their function as vehicles of commerce between neighbouring or riparian states. Hence, the riparians of each river share an identity of interests and are also its major users. In the case of straits and canals, however, their significance rests on their function of providing through transit between large oceanic realms and thus comprising maritime avenues of significance not only to international commerce, but to strategic, political, and military interests as well. It is their oceanic character and global significance that provide the basis for considering only straits and canals in this study.

Legal doctrine, jurisprudence, and practice have reflected these differences. In the case of territorial waters constituting international straits, a general right of innocent passage through these waterways evolved through customary law from the middle of the 19th Century[1], and was re-affirmed by the International Court of Justice in the 1949 Corfu Channel Case[2] and by the 1958 Territorial Sea Convention[3]. In the case of interoceanic canals, though these consist of internal waters and have never been the object of a general international convention as have straits, the respective treaties governing each of the three major interoceanic canals - Suez, Panama, and Kiel[4] - contained grants of passage "to all nations" of the world[5]. The Permanent Court of International Justice in the 1923 Wimbledon Case[6], recognized a basic similarity not only in the regime of the three canals, but in the function of international straits and interoceanic canals as channels of world commerce[7]. On the basis of these grants, and on the fact that passage through these canals has generally been universal and unimpeded in time of peace, it has been argued that these three canals are "internationalized" to the extent that the world community enjoys an actual right of passage through these artificial waterways resting on a number of varying legal concepts[8]. The underlying factor in the case of both straits and canals has been their importance to - and reliance by - the international community as a whole. In the case of rivers, however, no rights of passage to third-parties or non-riparians are recognized by general international law[9] or accepted as such by publicists[10]. While some treaty regimes have provided for free navigation on specific rivers by non-riparians[11], the practice is hardly universal and the results have been disappointing[12].

Interoceanic canals, being functionally similar to international straits, have, in a geographic sense, been referred to as "artificial straits"[13]. However, there are basic differences between the two which make it necessary to treat them separately when examining them from a legal point of view.

First, the Suez, Panama, and Kiel Canals are man-made waterways carved out of land at great expense to the respective riparian states or to the powers that constructed them[14].

Second, canals, by virtue of their artificial nature, involve large investments by the administrating agency or sovereign for the operation and maintenance of the waterway, including dredging, piloting, towage, and other navigational aids. This is especially true of the Panama and Kiel Canals thorugh which transit is accomplished with the aid of locks. The cost involved in the operation and maintenance of such canals is considerable[15].

International straits, on the other hand, require no construction or continuing maintenance or administration except in a small number of cases for such matters as marking and the provision of pilots[16]. For this reason, tolls are set and collected by the territorial sovereign for passage through these canals, and transit is conditioned by stringent rules of safety and security laid down by the sovereign or administrator.

Third, interoceanic canals are physically narrow channels cut through land within the territory of a state and, as such, their waters are internal waters, as opposed to straits which - depending on the width of the waterway - consist of either territorial waters or high seas. While both internal waters and territorial waters fall under the sovereignty of the coastal state, this sovereignty, in the case of the territorial sea, is limited by the right of foreign vessels to transit these waters, a right resting on customary and positive law. No such general right exists in internal waters. The three major canals and the extent of rights of passage through them - if any - are products of specific treaty arrangements to which the respective territorial sovereigns have been a party and which, though creating a separate legal status for each canal, contain sufficient similarities to warrant consideration of the existence of a "regime" of interoceanic canals[17].

Though the Permanent Court of International Justice in the 1923

Wimbledon Case assimilated canals to straits, in the sense that the passage of belligerent warships would not compromise the neutrality of the riparian state[18], this is insufficient to suggest an identity of law governing the two types of waterways. The fact that interoceanic canals comprise internal waters over which no innocent passage rights exist does not preclude the possible existence of a special status in the case of the Suez, Panama, and Kiel Canals by virtue of their position as vital thoroughfares and the similar nature of the treaties governing them. However, assuming the existence of such a status, any "right" of passage to foreign vessels would comprise an exception to the general rule applicable to internal waters. Such, of course, is not the case with international straits, where, conversely, any restriction on passage would be inconsistent with both the customary and positive law regulating them.

The Problem

While mention has been made of a right of innocent passage through international straits firmly resting on the customary and positive law, the precise nature of this right and of the conditions surrounding it remain obscure, and in many cases undefined. This problem has assumed a special importance in view of the impending extension of territorial seas to 12 miles which will bring some 116 international straits within the innocent passage regime. In the case of the three interoceanic canals, while grants of free passage are contained in each of the respective governing conventions and passage has in practice been generally unimpeded to merchant vessels in time of peace, the question remains as to whether these grants or subsequent state practice created legally enforceable rights (as opposed to a mere privilege) in favour of the world community.

On the basis of the uncertainties surrounding these two types of waterways, this study will examine the legal nature of international straits and interoceanic canals in an effort to define more precisely the position of these waterways vis-a-vis the international community. In essence, the thesis will ask whether, in the case of international straits, the existing and proposed law satisfy the competing interests of strait states and user states alike, and in the case of interoceanic canals, whether it is valid to assume the existence of a right of passage in favour of maritime navigation. More specifically, the inquiry will center on these basic questions:

In the case of international straits,

(1) What are the vague and undefined areas that have characterized its legal regime to the present time?

(2) To what extent have these areas been satisfactorily dealt with at the ongoing Third United Nations Conference on the Law of the Sea?

(3) How might these be more effectively dealt with?

In the case of interoceanic canals,

(1) To what extent and on what bases might the international community enjoy an actual right of passage (as opposed to a mere privilege or benefit), thus allowing these canals to be referred to as "internationalized"?

(2) To what extent can it be argued that interoceanic canals are governed by a common body of law?

(3) What is the feasibility of placing these canals under some form of international administration?

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1. For a comprehensive account of the history and development of the law of straits see E. Bruel, International Straits : A Treatise on International Law (Copenhagen, 1947), Ch. 1, esp. p.106.

2. (1949) I.C.J. Rep., p.4.

3. Convention on the Territorial Sea and Contiguous Zone, Geneva, April 29, 1958, 516 U.N.T.S. 205.

4. Though other canals may connect two seas, they are not of international importance (e.g., the Baltic-White Sea Canal, the Gota Canal, and the Corinth Canal). Also, the Suez, Panama, and Kiel Canals were created, and have functioned, under strikingly similar legal regimes.

5. Convention of Constantinople of 1888, 79 British and Foreign State Papers, p.18 (art.1); Hay-Pauncefote Treaty of 1901, 94 British and Foreign State Papers, p.473 (art.3); Treaty of Versailles of 1919, 112 British and Foreign State Papers, p.1 (art.380).

6. P.C.I.J., Ser. A, No.1 (1923).

7. Ib., at p.28. See infra note 18.

8. See e.g., R.R. Baxter, The Law of International Waterways With Particular Regard to Interoceanic Canals (Mass., 1964), pp.168-186; I. Brownlie, Principles of Public International Law (Oxford, 1973), pp.272-273; C.J. Colombos, International Law of the Sea, rev. ed. (New York, 1967), p.200.

9. This was the view of the International Law Association's Committee on the Uses of International Rivers in 1961, Report of the Fiftieth Conference (Brussels, 1962), p.451. See also J.G. Starke, An Introduction to International Law (London, 1963), p.174.

10. According to Baxter

> International rivers remain in a legal sense the product of the instruments internationalizing them. The right of free passage exists only to the extent that it has been created for a particular river; it has not passed into customary law.

Supra note 8, at p.186. H.A. Smith, an earlier noted authority on river law considers any free navigation theory on rivers as "in flagrant conflict alike with the facts of nature and with the practice of the world," The Economic Uses of Rivers (1931), p.9. See also L. Oppenheim, International Law, Vol.1, 8th ed., edited by H. Lauterpacht (New York, 1955), p.474.

11. E.g., The Congo and the Niger in Africa, the Amazon and the Paraná in South America, Colombos, supra note 8, at pp.239-258.

12. E.g., The Act of Mannheim of 1868 which still governs navigation through the Rhine extended freedom of navigation to all nations, but "riparian national treatment" differs from non-riparian shipping by a number of restrictions. Boatmen must "have sailed on the Rhine for a definite period" and must receive a licence from a riparian state, Revised Convention for the Navigation on the Rhine, 1868, 20 Martens, N.R.G., 355 (1875), arts.1,2,15,22. A 1921 treaty provided for free navigation on the Danube "to all flags," but since 1948 that River has been governed by the Belgrave Convention signed by seven communist riparians and which can exclude the vessels of non-riparians, 33 U.N.T.S. 196. For an examination of the rather disappointing history of the Danube, see H.A. Smith, "The Danube," 4 Yearbook of World Affairs (1950), pp.111-166; M. Sahovic and W.W. Bishop, "The Principle of Free Navigation and its Application to International Rivers," in M. Sørensen (ed.), Manual of Public International Law (London, 1968), p.327.

13. Colombos, supra note 8 at p.200.

14. E.g., in the case of the Panama Canal, a French company lost some $290 million and some 22,000 lives after an unsuccessful attempt to construct that waterway between 1883 and 1889, W.D. McCain, The United States constructed the Canal between 1903 and 1914 at a total cost of some $400 million and almost 6,000 lives. The Suez Canal took ten years to construct (1859-1869) at a cost of some $80 million, D. McCullough, The Path Between the Seas (new York, 1977), pp.235, 610.

15. E.g., the total operating expenses incurred by the Panama Canal during fiscal year 1975 amounted to $260 million, Annual Report of the Panama Canal Company, fiscal year ended June 30, 1975 (Canal Zone, Dec. 1975), p.30.

16. The Montreaux Convention of 1936 permits Turkey to collect tolls on a tonnage basis from vessels transiting the Turkish straits to cover the cost of sanitary control stations, lighthouses, buoys, and life-saving devices. This is an exception to the general case of straits, however, and can be justified by the fact that the Turkish Straits are the narrowest (750 yards minimum width) of the world's important straits and one of the five most heavily trafficked. See R.D. Hodgson and T.V. McIntyre, "Maritime Commerce in Selected Areas of High Concentration," in T.A. Clingan and L.M. Alexander, Hazards of Maritime Transit (Mass. 1973), p.13.

17. This is essentially the view taken by the Permanent Court in the Wimbledon Case involving transit through the Kiel Canal, P.C.I.J., Ser. A, No.1 (1923).

18. The Court in its majority judgement involving access to the Kiel Canal, referred to the Suez and Panama Canals as "precedents" which were

> merely illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign state under whose jurisdiction the waters in question lie.

ib., at p.28.

PART ONE

INTERNATIONAL STRAITS

INTRODUCTION TO PART ONE

The concern for the exploitation and conservation of living and non-living resources brought on by a political system characterized by newly independent and developing states with increasing populations and levels of political awareness within a world of dwindling food and energy reserves, has produced, especially in the last decade, a global and intense debate regarding the extent to which states may exercise sovereignty and jurisdiction over their coastal waters. The debate has revolved around a fundamental conflict of interests: the legitimate need of littoral states for controlling a larger area of coastline for economic and strategic reasons and the no less legitimate dependence of maritime states on the unhampered navigation of the seas, also for economic and strategic reasons. Disagreement on the one hand as to the distance and nature of jurisdiction to be exercised by the littoral state over its marginal sea, and on the other the extent of freedom of navigation and rights of passage available to maritime interests through these areas, has been bitter and widespread. The last decade has witnessed claims over marginal seas ranging from 3 nautical miles to a distance of 200 nautical miles, and complicated even more by varying degrees of jurisdiction.[1]

A central concern amidst the scramble for control of the world's oceans is that of the effect of the extension of territorial seas on passage through straits used for international navigation. There exist today some 116 straits of importance to international navigation that measure more than 6 but no more than 24 miles in width.[2] With a general adoption of a 12-mile territorial sea, these straits will no longer contain high seas areas. Under a 3-mile territorial sea a space of high seas waters is left between the two coasts through which vessels can freely transit with no restrictions whatever imposed by the littoral states. Under a 12-mile rule, however, they will consist entirely of territorial seas and, consequently, will become subject — under the 1958 Convention on the Territorial Sea[3] — to the ill-defined and controversial concept of "innocent passage." Article 16.1 of that Convention allows the coastal state within its territorial sea the right to "prevent passage which is not innocent," with innocence defined in no more specific terms than a passage which "is not prejudicial to the peace, good order or security of the coastal state" (art. 14.4). In the case of territorial seas constituting straits "used for international navigation," the coastal state is not permitted to suspend innocent passage (art. 16.4). Hence, confusion is evident not only by the ambiguous criterion of "used for international navigation" that is the legal yardstick to differentiate a strait where innocent passage can be suspended from one where such passage cannot be suspended, but by the fact that this article would still subject vessels passing through international straits to the vague criterion of innocence, since the coastal state still retains the right to prevent passage which is not innocent (i.e., prejudicial to the peace, good order or security of the coastal state).

There is also uncertainty as to the passage of warships through international straits. The 1949 Corfu Channel case[4] postulated a right of innocent passage for warships in time of peace, and article 23 of the 1958 Convention (the only article mentioning warships) implies freedom of passage for warships when it states that the coastal state may require a warship to leave the territorial sea if it "does not comply with the regulations of the coastal state." However, the extent to which these "regulations" can place restrictions on the passage of warships (e.g., prior notice or permission) and the discretionary powers given the coastal state to prevent passage "prejudicial" to its "security" (art. 14.4) leaves the question shrouded in obscurity.

Though the question of a right of passage through the territorial sea, particularly in straits areas, has been a controversial topic among publicists since the 18th Century, state practice until recently has revealed little in the way of controversy. This has been due not only to the fact that under a 3-mile territorial sea there were relatively few straits of international importance consisting entirely of territorial seas that could become the source of contention, but also to the fact that the shipping of the time posed little threat to the littoral state or its resources. The last decade, however, has witnessed on the one hand an increased concern on the part of coastal states for the protection of their security and offshore resources and on the other the advent of supertankers and other vessels with a far greater potential for threatening these vital interests. Moreover, these forces have surfaced together with an increasing number of new and developing states, most of them coastal states, who, as a group, have managed to effectively defend their own interests and, in so doing, challenge those of traditional maritime powers. Hence, within such an international environment, the general extension of territorial seas to 12 miles immediately raises the question of passage through these waterways to the level of a critical issue to which the vague provisions of the 1958 Convention provide little in the way of legally satisfying solutions. The key concern, of course, is the fact that where arbitrary and unreasonable coastal state regulations applying to territorial waters off an open coast would in any case be an inconvenience to maritime navigation, such regulations when applied to a straits area could severely hamper international communication, since in many cases they would restrict or impinge upon the use of vital maritime passageways.

Part One of this dissertation, then, will examine the history, doctrine, jurisprudence, and positive law relating to the legal status of straits and inquire critically into the recent efforts to draft a new law of the sea as they apply to these important maritime highways. A central consideration throughout this study will center on the extent to which the conflicting interests of coastal and maritime states have been dealt with, especially as regards the 1958 Convention and the recent trends evidenced at the ongoing Third United Nations Conference on the Law of the Sea.

The first chapter will provide a background for this study by examining the geographic nature and importance of international straits both to the littoral and user states, and the factors that have accounted for the basic conflict between the two interests.

The second chapter will begin the inquiry into the legal nature of straits by focusing on the views of publicists and the practice of states from the 17th Century up to the present time. This chapter will also inquire into the 1949 Corfu Channel case and the results of the 1958 Law of the Sea Conference as they apply to straits.

The third chapter will examine critically the relevant provisions of the 1958 Convention together with the contributions of the Corfu Channel case as these combine to govern the present legal status of international straits.

Having arrived at an understanding of the legal position of straits on the basis of the 1958 Convention and the World Court decision, the fourth chapter then attempts to compare international straits, from a legal standpoint, to international rivers and interoceanic canals, since legal analogies have frequently been made between these three types of waterway.

The fifth chapter examines the efforts made by the ongoing Third United Nations Conference on the Law of the Sea to draft a new set of conventions (or overall convention) to regulate the use of the oceans as these relate to international as well as non-international straits. This chapter will focus on a critical examination of the Informal Composite Negotiating Text[5] resulting from the Sixth Session of that Conference, since it represents as near a consensus on the overall issues as is possible at present, and is thus the clearest indication to date of the final outcome of that Conference.

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1. U.S. Dept. of State, Bureau of Intelligence and Research, Limits in the Seas: National Claims to Maritime Jurisdiction, 3rd. Rev., Dec. 23, 1975, p. 8.

2. Office of the Geographer, U.S. Dept. of State, Map of World Straits Affected by a 12-mile Territorial Sea, No. 564375, Dec., 1974. For a listing of the world's major straits see Appendix, p.139.

3. Convention on the Territorial Sea and Contiguous Zone, Geneva, April 29, 1958, 516 U.N.T.S. 205 (hereinafter referred to as the 1958 Convention).

4. (1949) I.C.J. Rep. 4, at p. 28.

5. Doc. A./CONF. 62/WP. 10, July 15, 1977.

CHAPTER I

THE GEOGRAPHIC NATURE OF STRAITS

A. THE GEOGRAPHIC CONCEPT OF STRAITS

The oceans, covering some 70.8 percent of the surface of the earth,[1] are interconnected by numerous passageways or narrow bodies of water through which ships must navigate in order to travel between oceanic realms or to enter or exit semi-enclosed seas. These waterways, commonly called straits, are at times also referred to as channels (e.g., Dominica Channel), passages (e.g., Windward Passage), belts (e.g., Great Belt, Little Belt), or sounds (e.g., The Danish Sound). These various terms, however, are more the product of local nomenclature or history than of precise geographic definition or configuration.[2] Hence, regardless of the proper name given the waterway, we will use the term strait — in the geographic sense — to refer to any natural narrow sea channel which separates two adjacent landmasses and joins two larger bodies of water.[3]

B. THE LOCATIONAL ASPECTS: RELATIVE IMPORTANCE

The geographic realities of site and situation are, of course, essential elements in determining the relative importance of individual straits. A key factor governing the importance of a particular strait is whether or not there exists a viable alternative passage in and out of a particular water body. A strait that comprises the only entrance into a semi-enclosed sea (e.g., the Strait of Gibraltar) is of considerably more importance than one that connects two oceans (e.g., the Strait of Magellan), since a strait connecting two oceans is in many cases complemented by an alternative strait or open sea passage through which transit — albeit involving a longer route — may be accomplished. In addition to this, and other considerations involving the physical nature of the waterway (configuration, depth, weather conditions, etc.), relative importance is also dependent on the position of the strait relative to major international trade routes, and the differing economic, political, and military needs of individual states.[4] Moreover, these needs, along with shipping technology[5] and trade patterns are subject to constant shifts. Changes in sources of supplies or resources, or unstable local political conditions can alter the relative importance of different straits.[6]

Based on these considerations and criteria, some 116 straits are regarded as significant to maritime navigation, of which 18 are considered as vital and the remainder as either important or convenient.[7]

C. THE ECONOMIC, POLITICAL, AND STRATEGIC SIGNIFICANCE OF STRAITS

1. To Maritime Navigation

The oceans serve as a continuous highway to all but 29 of the world's nations and, by far, the dominant economic value of the sea at the present time involves the use of its surface as a medium of transportation.[8] Though the shipbuilding industry is presently experiencing a notable slump in orders, begun in 1974 as a result of the rise in oil prices and the worldwide recession,[9] the merchant fleet of the world has grown three times in number and twelve times in tonnage since the beginning of the century. The annual growth in tonnage over the last ten years has averaged 10 percent per year.[10] While there has been a prominent decline in passenger service, the amount of cargo transported by sea more than doubled from 1960 to 1969.[11] The increase in maritime commerce is reflected far more in tonnage than in numbers of ships, due to the increase in the number of supertankers;[12] however, during the period December 31, 1972 to December 31, 1976, there was a net increase of

2,577 ships in the world merchant fleet (oceangoing vessels of 1000 gross tons and over).[13] As a result of the present shipbuilding slowdown, it is, of course, difficult to forecast the course of international shipping.[14] However, the trend toward the construction of smaller vessels resulted in an increase of 15 percent in the world tanker fleet alone during the year 1975.[15]

Given the strategic location of many straits, these waterways comprise the single most important geographic factor affecting many trade routes and much shipping.[16] It has been estimated that one day's delay can cost a modern U.S. tanker $14,000 in operating costs, in addition to the possible cost of delay in arrival of its cargo.[17] Along the margins of the oceans are literally hundreds of partially enclosed seas, gulfs, bays, inlets, and other coastal indentations. Some 26 of these waters are large semi-enclosed seas with at least 50 percent of their circumference made up by land.[18] Many of the world's major ports are located within these semi-enclosed water bodies, and most major world shipping routes pass through a part of one of these 26 seas.[19] Moreover, some 76 of the world's 161 states border on, or are located within, one or more of these seas. These facts are significant if only because a great majority of the more important straits of the world are located at the entrances to these semi-enclosed seas.[20] For example, the states bordering the Baltic Sea, Black Sea, Mediterranean Sea, and Persian Gulf, as well as the states trading with these, are especially vulnerable, since the Danish Straits, Turkish Straits, Strait of Gibraltar, and Strait of Hormuz are, respectively, the only ocean routes in and out of these seas.[21] Other straits afford vital routes that shorten considerably the distance between two points. It has been hypothesized, for example, that were the various

Indonesian Straits (Lombok, Sunda, Ombae, etc.), the Malacca Strait, and Australia's Bass Strait[22] closed by the coastal states to the passage of large tankers because of the possibility of oil spills, a 250,000 dwt tanker enroute from the Persian Gulf to San Francisco would be forced to sail through the Indian Ocean around the Cape of Good Hope, and then through the Strait of Magellan or around Cape Horn. This detour would add 8 sailing days and at least 4,370 miles to the one-way voyage.[23] The possibility of such closures is real. The growth in the number of ships has resulted in the congestion of certain straits, particularly those of Dover and Malacca/Singapore,[24] while the larger size of ships — with their deep draft and lack of maneuverability — has increased the possibility of collision and, consequently, of disastrous oil spills. This fear, according to the governments of Malaysia and Indonesia, prompted these countries in November, 1971 to jointly announce the closure of the Straits of Malacca and Singapore to all outsize tankers in excess of 200,000 dwt, and the requirement of prior permission for all warships, though they recognized the use of these straits by international shipping in accordance with the principles of innocent passage.[25] Iran has proposed a plan to regulate traffic through the Strait of Hormuz — the only means of entrance to the Persian Gulf — to prevent pollution and ensure security.[26]

In addition to the vital economic factors involved in the efficient transportation of goods, a threat to the freedom of navigation through straits could imperil a nation's security. The flow of oil, for example, on which industrialized nations depend as a primary source of energy, is itself dependent not only on the political situation in the Middle East, but on free access to such straits as Gibraltar, Bab-El-Mandeb, and

Hormuz, which provide the only sea links to the Mediterranean, Red Sea, and Persian Gulf respectively, all bordering on the ports of major oil-producing nations, as well as on the numerous straits that provide shorter routes for the more efficient — and hence less costly — transport of this and other commodities.[27]

Military security is another area of concern affecting access to straits, especially in the case of the larger powers. To the United States the Strait of Gibraltar is vital to the movement of its Sixth Fleet in the Mediterranean, as are the Straits of Malacca and Singapore for the movement of the Seventh Fleet into the Indian Ocean.[28] Closure or restrictions on passage through the various Indonesian straits would involve a considerable detour south of Australia.[29] The United States' capacity for nuclear deterrence, largely dependent on the use of its nuclear powered submarines with nuclear missiles (SSBN's) could also be undermined were restrictions to be placed even when transiting on the surface.[30] For these vessels, the Straits of Gibraltar, Ombae, Wetar, and Lombok are regarded as vital to the interests of the United States.[31] It is hardly surprising that the matter of unimpeded transit through straits has been of utmost priority for the United States at the Third United Nations Conference on the Law of the Sea.[32]

The Soviet Union is no less dependent on access to straits. Of its four fleets only its Northern fleet based in Murmansk has an ice-free, straits-free route to the open oceans. The fleet in the Baltic must pass the Danish Straits to reach the North Sea and the Atlantic, and the Black Sea fleet must pass through the Turkish Straits to reach the Mediterranean. A squadron in the Mediterranean depends on the Strait of Gibraltar to reach the Atlantic, and its Pacific fleet in the Sea of Japan must pass through the various Japanese straits to reach open sea.[33]

Hence, when considering the dependence by the superpowers and other maritime states on unimpeded passage through international straits, it is not surprising that the question of passage through these waterways is, as one commentator described it, "the gravest political issue of the general law of the sea which the Conference faces, and the success of the Conference depends upon its solution."[34]

2. To States Bordering Straits

To states bordering straits, i.e., littoral states, these waterways can, in many cases, also represent or affect vital interests. The mere volume and proximity of vessel traffic can be a matter of genuine concern, since groundings, collisions, spills, or sinkings can at the least obstruct shipping, and at worst cause irreparable damage to the adjacent nation's waters, shorelines, and, ultimately, the welfare of its people. According to Lloyd's, some 350 vessels are lost at sea each year, and more than 700 are broken up.[35] During the years 1969-73, more than 3000 tanker accidents occurred throughout the world's oceans, resulting in more than 450 polluting incidents and a total loss into the water of more than 7 million barrels of oil.[36] The past 3 years have witnessed a dramatic rise in tanker mishaps and resulting oil spills. During the first 3 months of 1974 alone, there were 326 tanker casualties throughout the world,[37] and 1976 became the worst on record in the history of high seas oil transportation. During the 4-weeks between December 15, 1976 and January 15, 1977 eight serious accidents occurred, including the grounding of the Argo Merchant which resulted in a 7.5 million gallon spill, the worst in the history of the U.S. Atlantic coast.[38] More than 1 1/2 billion tons of oil a year are transported by tanker, and of that total, it is estimated that more than 2 million metric tons are lost at sea.[39]

Tanker disasters in straits areas have been especially noteworthy. The Torrey Canyon disaster, though occurring in a relatively open area of the English Channel, still had serious consequences for both England and France. Having run aground on the Seven Stones Reef in March, 1967, the 67,000 ton Liberian tanker spilled the bulk of her cargo of 120,000 tons of crude oil, causing millions of dollars damage to the shores of Britain and France, the latter's coast being over 200 miles from the site of the grounding.[40] In February, 1970 the Liberian tanker Arrow grounded in Chedabucto Bay, Nova Scotia, spilling more than half of her 108,000 barrels of fuel oil and seriously polluting the Strait of Canso.[41] In August, 1974, the 206,000 dwt tanker Metula ran aground in the Strait of Magellan, spilling between 9 and 14 million gallons of oil.[42] Five months later the tanker Showa Maru ran aground in the Strait of Malacca, spilling some 3,300 tons of oil.[43] In November, 1975, the Liberian tanker Olympic Alliance collided in the Strait of Dover, spilling some 30,000 metric tons of oil.[44] The U.S.S. Manhattan, while negotiating Canada's Northwest Passage in 1969 spilled some 15,000 barrels of ballast water near Lancaster Sound after ice damaged her hull.[45] More recently, on March 16, 1978, the 234,000 ton American supertanker Amoco Cadiz ran aground off France's Brittany coast at the entrance to the English Channel, dumping its entire cargo of some 63 million gallons of oil, and thus becoming the worst oil spill on record.[46]

It is important to note that 70 to 80 percent of oil tanker discharges are attributable to normal tanker operations, while the remaining discharges are the result of casualties, spills, and leakage.[47] Estimates of the annual oil influx attributable to routine tanker discharges range from 500,000 to 5 million metric tons.[48] Although the quantity of oil discharged to the ocean per single tanker voyage is comparatively small, the high volume of world-wide tanker traffic makes operational oil pollution the primary source of oil pollution from tankers.[49] One authority states:

> Huge tanker disasters, as dramatic as they are, are not the major source of oil pollution. The most serious pollution comes from the thousands of insidious incidents — small ones but preventable — incidents of countless minor dumpings and spills from thousands of tanker operations — from emptying salt water ballast, pumping bilge waters, cleaning oil tanks, transferring and handling oil cargoes.[50]

In the case of straits, the density of traffic converging on a narrow passage would ensure a far greater amount of pollutants per given area than would normally exist on the open seas, and the proximity to shore would render the effects the more damaging.

While there are a number of conventions and instruments dealing with the prevention of operational discharges of oil into the sea, prevention of accidents resulting in discharges, and liability and compensation for damages from oil pollution,[51] they have, for the most part, especially those dealing with operational pollution, suffered from lack of enforcement and support from the major shipping nations.[52]

The density of traffic in straits can also adversely affect the fishing areas within and near these waterways. Exclusive of the obvious threat pollution presents to the natural resources in those waters, the volume of traffic through straits can make it physically impossible for the coastal state to exploit its fisheries and seabed resources in the area.[53] The discovery of offshore oil or natural gas would present substantial difficulties for the coastal state in attempting to accommodate both offshore drilling sites and routine navigation within the straits area.[54] There is also the competition from fishing fleets converging within the narrow area.[55]

The volume and proximity of traffic can also make strait states more vulnerable to potential threats against their security. Nuclear arms and materials on board passing vessels could endanger a coastal state, as can the possibility of intelligence activities, subversion, infiltration, or offensive military action conducted from transiting military vessels.[56] Straits can also become the scene of actual hostilities.[57]

An aspect yet to be exploited by strait states lies in the mere geographic fact of their location astride a navigable waterway. As opposed to states bordering on navigable rivers, strait states for the most part are not the prime users of their adjacent waterways, yet they can be the most immediately affected by their use. Especially in the case of those states bordering a highly-trafficked strait, it could be argued that that waterway constitutes a natural resource _to_ the coastal state,[58] and that consequently not only does that state have a right to regulate passage in order to protect its resources and security, but should also derive a benefit from allowing other states to utilize this resource.[59] Such an extreme position runs directly counter to the fundamental concept of freedom of the seas, of which straits constitute an integral part; however, the increasing amount of nationalism evidenced today, especially among the so-called developing states, and the recent scrambling for the world's resources would appear to set the groundwork for the erosion of the freedom of the seas doctrine in favor of increased coastal rights. At the least, the fundamental conflict of interests with regard to straits as discussed above — between the users of straits and the states bordering these waterways — appears to have reached its highest intensity.

D. STRAITS AND THE CONCEPT OF FREEDOM OF THE SEAS

There is probably no other doctrine in international law that has been as widely recognized and observed as has that of the freedom of the seas, which Schwarzenberger, for example, considers one of the seven fundamental principles of international law.[60] Since its general acceptance at the beginning of the 19th Century[61] the concept evolved through customary law, and in 1958 was codified in Article 2 of the Geneva Convention on the High Seas:

> The high-seas being open to all nations, no state shall validly purport to subject any part of them to its sovereignty. Freedom of the seas is exercised under the conditions laid down by these articles and by other rules of international law. It comprises *inter alia*, both for coastal and non-coastal states:
>
> (1) Freedom of navigation
> (2) Freedom of fishing
> (3) Freedom to lay submarine cables and pipelines
> (4) Freedom to fly over the high seas.
>
> These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all states with reasonable regard to the interests of other states in the exercise of freedom of the high seas.[62]

The legal origin of the concept remains unclear. Some would argue that the high seas are *res nullius*, that they belong to nobody; others that they are *res communis*, belonging to everybody.[63] The debate, while interesting, should perhaps give way to a more practical consideration, for it can be argued that the freedom of the seas is not a self-contained legal doctrine, but a vital aspect of another norm — that of a right to commerce and communication between states by way of the transport medium afforded by the oceans. The mere freedom to sail on a particular sea or portion thereof is of little value were there not also a right to travel freely from sea to sea, or sea to ocean, as they case may be; that is, to communicate by way of water between two separate points, whether the purpose of that communication be for pleasure, strategic needs, or commerce. For Gidel, this is the basis for the freedom of the seas:

> Le principe de la liberté de la haute mer n'est pas une proposition démontrée, mais il s'impose pour des considérations finalistes tirées de l'idée de commerce international.[64]

E. THE EMERGENCE OF VECTOR FORCES

The uses of the sea remained stabilized for centuries prior to the Second World War, being confined to surface navigation and fisheries, and, later, the laying of cables and pipelines and the exploitation of seabed resources easily accessible from the shore. Since 1945, however, two dynamic forces emerged that revolutionized the uses of the sea. The first of these is technological. Not only have the traditional uses of the sea multiplied dramatically during the last three decades, but new uses have been discovered as a result of technological innovation.[65] The world harvest of fish grew from 16 million tons in 1950 to 70 million tons in 1975,[66] and merchant tonnage in the same period from 76 million to 560 million gross registered tons.[67] In fishing, the increase was due in large part to more powerful ships, larger nets, the detection of fish by electronic devices and earth satellites, and through the expansion of long distance fishing fleets.[68] As a result, the world catch is expected to reach 200 million tons by 1990.[69] As of 1976, more than 18,000 fishing vessels larger than

100 gross tons and involving some 101 nations engaged in fishing around the world.[70] In merchant shipping, the development and construction of specialized vessels for the transport of specific cargo, capable of increased speeds and greater tonnage have revolutionized the shipping industry. This increase was especially dramatic in the case of supertankers.[71]

Technology also provided more efficient means for the exploitation of offshore non-living resources. The recovery of offshore oil has increased dramatically. Of the approximately 20 billion barrels of oil produced throughout the world in 1974, some 20 percent came from offshore production, and this is expected to double within the next few years.[72] It is estimated that some 1,000,000 million barrels of petroleum, and the equivalent of 350,000 million barrels of natural gas lie beneath the world's continental shelves.[73] Deep-sea mining for nodules on the seabed yielding manganese, nickel, cobalt, and copper is in closer prospect than seemed possible a decade ago.[74]

Technology has also been responsible for the development of vastly improved surface and underwater warships, including the warhead-carrying strategic missile submarines.

The second dynamic force emerging since the Second World War can be termed the economic-political. The last three decades have witnessed a mass process of decolonization giving rise to a large number of new states, raising the number of sovereign nations to more than twice the number existing at the close of the War. Mainly poor, they were born into a highly traditional legal system that hardly reflected their pressing economic and social needs.[75] It was almost at midpoint between the close of the War and the present time that the First United Nations

Conference on the Law of the Sea, meeting in Geneva in 1958, adopted four conventions, dealing with the territorial sea and contiguous zone, the high seas, the continental shelf, and fishing and conservation of the living resources of the high seas. Important as these conventions were, they were never generally accepted by all nations. Some 86 states, slightly more than half of the present number of sovereign states, participated in the 1958 Conference.[76] With ratifications by less than one-third of the world's states, these conventions can hardly be viewed as representing the will or interest of the great majority of the members of the international community,[77] in particular the newly independent and developing states.[78] These states, while a heterogeneous group relative to their level of economic development, form of government and cultural background, were able to find common ground in their basic attitude toward the traditional law of the sea, which they saw as favoring the major powers — maritime and political.[79] Here the newly-independent states were joined by the older, but nevertheless developing nations of Latin America and Asia, comprising as a whole the loose grouping of states known as the "third world states."[80]

The two major forces outlined above — technology and the economic/political realities of the developing states — which mushroomed simultaneously after 1945, represented a host of conflicting interests. While excessive and irresponsible fishing had been recognized as a problem long before 1945, advances in fishing technology since that time have provided the means for even greater catches that threaten to deplete the living resources of coastal states, many of whom depend on fishing for employment of its citizens, for food, and for an item of trade export.[81] The dramatic increase in the number of supertankers created a new concern for protection of the environment, as oil spills and the dumping of wastes in or near coastal waters became a frightening prospect. The growing number of ballistic missile submarines and other strategic vessels prompt fears for the coastal states' security. Even the presence of another state's oceanographic research vessels offshore can be seen as a threat, or at least a kind of one-upmanship — the gaining of some unknown advantage through exploration of the sea off one's coast.[82] Coastal states readily argue that "freedom of the seas" is often little more than a self-serving slogan for those states benefiting from a generous interpretation of that doctrine, as they point to conspicuous links between "ocean science research" and the finding of minerals, between "ocean biology" and the catching of fish, and to known attempts to disguise military intelligence ships as scientific research vessels[83] (e.g., the *Pueblo*[84]). Their premise, of course, is that the freedom of the seas is not limited to a select and small group of purposes, but must adapt to changing needs, particularly their own.[85] This frame of mind was well expressed by the representative of Equatorial Guinea to the first substantive session of the Third U.N. Conference on the Law of the Sea in Caracas:

> The great maritime powers had built up their colonial empires on the principle of free navigation and had established as a natural law a limit of three nautical miles for the territorial sea....
> Today, the problem was no longer a matter of freedom of navigation — which no one disputed — but concerned exclusively the sovereign rights of states to protect and conserve the natural resources of their territorial seas. The Conference would have to establish a rule which would prevent piracy and would respect the just aspirations of countries that lacked the maritime and industrial power to exploit the wealth of the open sea and had to use their limited resources on exploiting and defending their territorial seas. In the light of scientific and industrial knowledge, a just rule would provide for a limit of 200 nautical miles.[86]

These were the concerns that — together with a recrudescence of nationalism throughout the world, and a realization of the potential wealth inherent in the oceans and beneath them — prompted coastal states to make unilateral declarations extending their territorial seas. By November, 1977, 88 states had laid claims to territorial seas of a breadth of 12 miles or more.[87] Canada joined their number in 1970 when, after the passage of the Manhattan through the Northwest Passage, that country extended its territorial sea limits to 12 miles and adopted an anti-pollution zone throughout Arctic waters extending 100 miles off the Canadian coast north of 60° North Latitude.[88] Prime Minister Trudeau's comments to the press explaining Canada's actions well reflect the attitude of the newer and non-maritime states:

> The position we take is that international law that now stands does not sufficiently protect countries on the pollution aspect of international waters. And it is important for Canada to take forward steps in this area to help international law develop.... The way international law exists now it is definitely biased in favour of shipping in the high seas and in various parts of the globe.... International law has been developed in order to have the concept of high seas which is favourable to navigation and to commerce everywhere. And this was fine in the past, but now with the advance of technology and the importance which is coming forth to us in all parts of the world — of not only thinking of commerce, but also of quality of life.
>
> ...We're attempting to do what's right in the Arctic — to protect those interests which are Canadian, and to protect those aspects which have to be protected....We're not adopting such laws as to preclude the ships of all nations and all conditions from going up there because it's in the interests of Canada that the north be developed. We just want to be sure that the development is compatible with our interests as a sovereign nation, and our duty to preserve the Arctic against pollution.[89]

The extended claims of jurisdiction over coastal areas have presented a formidable concern for the question of a right of passage through straits, for some 116 straits of importance both to commercial and strategic interests[90] would be brought — under a 12-mile rule — into the regime of the territorial sea and, hence, subject, under the 1958 Territorial Sea Convention, to the vague concept of innocent passage. The meaning and significance of this concept as it relates to straits will be treated in a later section of this study.[91] The important fact to consider at this point is that the waters within these straits, which up to now have been high seas waters based on a 3-mile rule, would henceforth be subject to coastal state sovereignty and, therefore, not open to free and unimpeded navigation.

As has been shown earlier, straits constitute vital channels which connect the seas and oceans of the world. They provide in most cases convenient routes for travel between two points, shortening the distance involved in travel; in many cases they provide the only means of access to and from the open sea. Without the use of these waterways the freedom of the seas would, for the most part, be useless and ineffectual. R.R. Baxter, for example, states:

> ... the right of free passage through international straits is but one aspect of the freedom of the seas. Without the right to pass from one portion of the high seas to another through a strait, the freedom of the seas would be much impaired, for wide detours would be caused and whole stretches of ocean cut off by a state's control of a single strait.[92]

It is also true, however, that the unregulated and careless use of straits can impose on coastal states genuine threats to their natural resources, security, and, consequently, their livelihood. Only

9 percent of marine casualties occur in the open ocean; the remaining 91 percent occur in coastal and internal waters.[93] When considering the converging of traffic in straits areas, the reduced maneuverability and huge petroleum content of supertankers, and evidence suggesting poor standards of seamanship,[94] the attitude of coastal states — especially strait states — can be viewed with some measure of sympathy.

It is this fundamental clash of interests between maritime powers and coastal states that has presented the continuing debate on the law and uses of the sea with one of its most volatile issues — that of transit through straits. In order to fully appreciate the true nature of this conflict as it exists today, it is necessary to trace the origin and development of the position of straits in international law and in the practice of states.

REFERENCES TO CHAPTER I

1. U.S. Dept. of State, Sovereignty of the Sea, Geographer's Bulletin No. 3, revised 1969, U.S. Dept. of State Publication No. 7849, p. 2.

2. G. Gidel, for example, defines a strait in the geographic sense as "... un passage maritime reserré entre deux terres, quelles que soient ces terres, quelle que soit la largeur de la voie, quel que soit le nom dont on la désigne 'detroit,' 'passage maritime,' 'passe,' 'canal,' 'sound,' etc. ...," Le Droit International Public de la Mer, vol. 3 (Chateauroux, 1934), p. 729.

3. This is in accordance with the definition generally given by geographers. See e.g., R.W. Smith, "An Analysis of the Strategic Attributes of International Straits: A Geographical Perspective," 2 Maritime Studies and Management; No. 2 (Oct., 1974), p. 88; Longmans Dictionary of Geography (London, 1966), p. 389.

4. See infra pp.17-25 for a discussion of the economic, political, and strategic significance of straits to both maritime navigation and coastal states.

5. See infra, p. 17.

6. E.g., The recent closure of the Suez Canal increased the importance of the Strait of Bab-El-Mandeb for traffic between the Middle East and Europe. The recent increase in the number of very large crude carriers (VLCC's) — those vessels over 150,000 dwt — and other types of superships has adversely affected the density of traffic through such straits as Malacca and Singapore, which are not deep enough for the safe navigation of these ships. The Straits of Dover, Kattegat, and Ore Sund also have limiting depths. Consequently, such straits as Lombok and Sunda have risen in importance, since they provide navigable alternative routes, R.W. Smith, supra Note 3, at pp. 123, 124, 129. The increase in the number of large tankers has also presented a problem for the Suez Canal. Its comparatively shallow waters cannot accommodate most large tankers of more than 60,000 dwt laden, ib., pp. 124, 126.

7. For a listing of these straits see Appendix, p. 139.

8. For an analysis of the various uses of the sea and their respective values see United Nations Economic and Social Council (UNESCO), Uses of the Sea, study prepared by the Secretary-General, E/5120, April 28, 1972, pp. 5, 6; P.S. Rao, "Competing Uses of the Sea," Ch. 5 of The Public Order of Ocean Resources: A Critique of Contemporary Law of the Sea (Mass., 1975), pp. 109-165.

9. It appears that the slowdown has sparked a trend toward the construction of smaller vessels, especially tankers in the 50,000 to 140,000 dwt range, since cancellations following the oil crisis amounted to only 6 percent of the total number of tankers on order, Financial Times, Feb. 17, 1975, p. 5. Of some 120 tankers placed

on order during the year 1977, all were within or below the dwt range mentioned above, "Statistical Summary Tables," 3 Tanker and Bulker International, Series II, Nos. 1-11 (Jan.-Dec., 1977).

10. Lloyd's Register of Shipping, Statistical Tables 1976 (London, Nov., 1977), p. 3.

11. The amount of cargo transported by sea increased from 1,110 million metric tons in 1960 to 2,280 million metric tons in 1969. Petroleum accounts for much of this increase. While tanker tonnage accounts for less than half of the world fleet, it carries over two-thirds of the world trade. Shipment of crude petroleum alone is expected to reach almost 5 billion metric tons by 1980, which is more than double the total amount of cargo transported in 1969, Uses of the Sea, supra note 8, at pp. 23-24.

12. As recently as 1966 there was only one ship in the world over 200,000 dwt. Today there are over 600 of these in existence, U.S. Dept. of Commerce, A Statistical Analysis of the World's Merchant Fleets as of December 31, 1976 (Washington, D.C., 1977), p. 2.

13. U.S. Dept. of Commerce, Maritime Administration, Merchant Fleets of the World (Washington, D.C., 1977), p. 2.

14. E.g., in 1972 it was estimated that between 1970 and 1988, the number of container ships would increase by factors of 4 to 8, and that there would be increases in the order of 200 to 400 percent in the fleet capacity, annual trade, and average tonnage of bulk carriers and tankers, R.R.V. Wiederkehr, "A Forecast of 1970-1985 World Shipping," Technical Report No. 199, SACLANT ASW Research Center, La Spezia, Italy, 1972.

15. 3 Tanker and Bulker International, Series II, No. 1 (Jan., 1977), p. 8.

16. R.D. Hodgson and T.V. McIntyre, "Maritime Commerce in Selected Areas of High Concentration," in T.A. Clingan, Jr. and L.M. Alexander (eds.), Hazards of Maritime Transit (Mass., 1973), p. 8.

17. Ib., p. 6.

18. L.M. Alexander, "Special Circumstances: Semi-enclosed Seas," in J.K. Gamble and G. Pontecorvo (eds.), Law of the Sea: The Emerging Regime of the Oceans (Cambridge, Mass., 1974), pp.204-06.

19. See "Relationship of Major Currents, Major Shipping Routes and a 200 Nautical Mile Pollution Zone," map prepared by the Office of the Geographer, Bureau of Intelligence and Research, U.S. Dept. of State (Washington, D.C., 1973).

20. See listing of straits in Appendix, p.139.

21. Closure of the Suez Canal would make the Strait of Bab-El-Mandeb the only means of access to the Red Sea.

22. The Torres Strait between Australia and Papua has a limiting depth of 39 feet, which would not allow for the passage of supertankers, Smith, supra note 3, at p. 101.

23. R. McNees, "Freedom of Transit through International Straits," 6 Journal of Maritime Law and Commerce (Jan., 1975), p. 187.

24. It has been estimated that over 300,000 vessels per year transit the Strait of Dover, Oceanology International, Jan., 1971, p. 17. A traffic volume estimate for the Strait of Malacca sets the figure at 40,000 vessels per year, Miami Herald, Aug. 13, 1972, Sect. H, p. 4. Actual traffic statistics through straits tend to be contradictory and unreliable. On the difficulty involved in obtaining reliable data see R.D. Hodgson and T.V. McIntyre, supra note 16, at pp. 10-11.

25. M. Leifer and D. Nelson, "Conflict of Interest in the Straits of Malacca," 49 International Affairs (London), 1973, p. 190. The joint declaration has, in practice, had no effect, and the two countries have not attempted to enforce their claims, a result, perhaps, of the outcry by major maritime states over the announcement, and by Singapore's refusal to support the Indonesia-Malaysian position as regards any encroachment on the international status of the straits, ib., at p. 194. It has been suggested that these moves by Malaysia, and Indonesia were in fact an effort to restrict the strategic mobility of maritime powers which possess the capacity to pose a challenge to the security of Indonesia, since the straits do indeed afford access into the vast Indonesian Archipelago. The acquisition of leverage with which to secure additional economic assistance from Japan, a major user of the waterway, might also have been a probable reason. There is, however, also valid cause for concern over pollution of the straits, which have a traffic of some 40,000 vessels annually, mainly tankers. The fear of a disaster such as the Torrey Canyon grounding off the English coast in 1967 (see infra note 40 and accompanying text) prompted a hydrographic study of the straits in 1968 that revealed serious discrepancies between actual depths and those shown on charts, ib., pp. 192, 196. The Strait of Malacca is 8 miles wide at its narrowest and the Strait of Singapore 2. At present, tankers of 250,000 dwt or larger cannot navigate the straits safely, E.F. Oliver, "Malacca: Dire Straits," 99 U.S. Naval Institute Proceedings, No. 6/844 (June, 1973), p. 30.

26. "Iran Seeks to Control Persian Gulf Entry," Washington Post, March 23, 1973, p. 1. Traffic separation schemes setting up specific lanes have been adopted in straits such as Gibraltar, Malacca, and Singapore, R. Oudet, "The Ordering of Seaborne Traffic," 22 Journal of the Institute of Navigation (1969), p. 59.

27. See "NATO Studying Vulnerable Sea Lanes," New York Times, July 24, 1974, p. 2.

28. J. Knauss, "The Military Role in the Ocean and its Relation to the Law of the Sea," in L. Alexander (ed.), Law of the Sea: A new Geneva Conference (Kingston, R.I., 1971), pp. 77, 81-82. For an assessment of the importance to the United States of strategic mobility on the seas see J. Knauss, Factors Influencing a U.S. Position in a Future Law of the Sea Conference, Law of the Sea Institute Occasional Paper No. 12, April, 1971, pp. 2-8, 20. For a discussion of the importance of strategic straits to American and Soviet sea power see D.P. O'Connell, The Influence of Law on Sea Power (Manchester, 1975), pp. 97-113.

29. M.W. Janis, "Naval Missions and the Law of the Sea," 13 San Diego Law Review, No. 3 (1976), pp. 589-90.

30. Though submarines are presently required to navigate on the surface and show their flag when engaged in innocent passage through the territorial sea (Convention on the Territorial Sea and Contiguous Zone, Geneva, April 29, 1958, 516 U.N.T.S. 205, art. 14.6), there is apprehension that the establishment of a 12-mile rule will bring on further restrictions, even to surface passage, F. Nolta, "Passage Through International Straits: Free or Innocent? The Interests at Stake," 11 San Diego Law Review, No. 3 (1974), pp. 822-23. In this regard it is interesting to note that Egyptian authorities recently refused passage through the Suez Canal to the British Nuclear powered submarine Dreadnought, apparently fearing the danger of radioactive contamination. Since it re-opened two years before, no nuclear submarine has been allowed through the Canal, The Times (London), October 31, 1977, p. 1a.

31. Some 16 straits are regarded as "strategic" for these vessels, of which the 4 mentioned are designated as vital, F. Kruger-Sprengel, The Role of NATO in the Use of the Sea and Seabed (Washington, D.C., 1972), p. 28. See R.E. Osgood, "U.S. Security Interests and the Law of the Sea," in R.C. Amacher and R.J. Sweeney (eds.), The Law of the Sea: U.S. Interests and Alternatives (Wash., D.C., 1976), pp. 13-26.

32. The importance given this matter by the United States is evidenced by the stated position of that country at the U.N. Conference, where development and preservation of resource interests have been given secondary consideration over strategic military interests. The United States has consistently been willing to trade off the principles of a 12-mile territorial sea with preferential littoral state fishing rights in the area beyond and a narrow continental shelf with a generous seabed regime in exchange for freedom of transit through international straits, G.P. Smith, III, "The Politics of Lawmaking: Problems in International Maritime Regulations — Innocent Passage v. Free Transit," 37 University of Pittsburgh Law Review (spring, 1976), p. 531. A Department of State press release of February 25, 1970 stated:

> The United States supports the 12-mile limit as the most widely accepted one, but only if a treaty can be negotiated which will achieve widespread international acceptance and will provide for freedom of navigation through and over international straits.

Dept. of State Press Release #64, 64 Dept. State Bull. No. 1603 (March 16, 1970), p. 343 (emphasis added). See also address by Secretary of State Kissinger before the Foreign Policy Association on April 8, 1976, 74 Dept. State Bull. No. 1922, April 26, 1976, pp. 533-42, esp. p. 536.

33. Janis, supra note 29, at pp. 586-87. See also C.A. Smith, "The Meaning and Significance of the Gorshkov Articles," 26 Naval War College Review, No. 5 (March-April, 1974), p. 21.

34. S. Rosenne, "The Third United Nations Conference on the Law of the Sea," 11 Israel Law Review, No. 1 (Jan., 1976), p. 37.

35. Lloyd's Register of Shipping, Statistical Tables 1976 (London, Nov., 1977), pp. 72-73.

36. Card, Ponce, and Snider, "Tank Ship Accidents and Resulting Oil Outflows, 1969-73," in Environmental Protection Agency, American Petroleum Institute, U.S. Coast Guard, 1975 Conference on the Prevention and Control of Oil Pollution (1975), p. 205.

37. R.J. McManus and J. Schneider, "Shipwrecks, Pollution, and the Law of the Sea," 51 National Parks and Conservation Journal (June, 1977), p. 10. For a vivid account of tanker disasters, see N. Mostert, Supership (New York, 1974), esp. Chs. 2 and 3.

38. During this four week period, the tankers Argo Merchant, Grand Zenith, Sansineva, Olympic Games, Universe Leaders, Oswego Peace, Daphne, and Irene's Challenger either went aground, sunk or split. All were "Flag of Convenience" ships registered in either Panama or Liberia, 10 Oceans, No. 2 (March-April, 1977), p. 54.

39. National Academy of Sciences, Petroleum in the Marine Environment (1975), p. 105. See E.V.C. Greenberg, "IMCO: An Environmentalist's Perspective," 8 Case Western Reserve Journal of International Law, No. 1 (Winter, 1976), pp. 131-48.

40. G.W. Keeton, "The Lessons of the Torrey Canyon: English Law Aspects," 21 Current Legal Problems (1968), pp. 95-96.

41. D. Pharand, The Law of the Sea of the Arctic (Ottawa, 1973). See also Edmonton Journal, July 25, 1977, p. 11.

42. Wall Street Journal, Sept. 11, 1974, p. 1.

43. New York Times, Jan. 7, 1975, p. 1.

44. Sea Frontiers, Vol. 23, No. 2 (March-April, 1977), p. 79.

45. B. Keating, "North for Oil, Manhattan Makes the Historic Northwest Passage," 137 National Geographic (1970), p. 391. See infra note 88 and accompanying text.

46. New York Times, March 19, 1978, p. 1; March 25, 1978, p. 1.

47. R.J. Skocypec, "The 1973 IMCO Convention: Tightening the Controls on Operational Oil Pollution from Tankers," 5 UCLA-Alaska Law Review, No. 2 (spring, 1976), p. 354.

48. L. Blumer, "Scientific Aspects of the Oil Pollution Problem," 1 Environmental Affairs (1971), pp. 54-55. Operational discharges include "tank washings," "clingage," "dirty ballast," and "bilge waters," Skocypec, supra note 47, at pp. 355-56.

49. Skocypec, supra note 47, at p. 354. Operational oil pollution can have disastrous effects; e.g., in February, 1970 some 1000 miles of Alaska's Kodiak Island chain were covered with oil, killing possibly as many as 100,000 birds. The suspected source was ballast discharges from tankers proceeding to terminals in the Cook Inlet, "Alaska Tanker Spills Prompt Ultimatum" Oil and Gas Journal, April 6, 1970, p. 63.

50. M.N. Edwards (Asst. Secretary for Water Pollution Control, U.S. Dept. of the Interior, Washington, D.C.), "Oil Pollution and the Law," Paper No. 20, Proceedings, International Conference on Oil Pollution of the Sea, Rome, Oct. 7-9, 1968, p. 292.

51. E.g., The Convention on Civil Liability for Oil Pollution Damage, 1969 [Rep. in 9 International Legal Materials (1970), p. 45]; Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 1972 [Rep. in 11 ib. (1972), p. 1294]; International Convention for the Prevention of Pollution from Ships, 1973 [Rep. in 12 ib. (1973), p. 1319].

52. Skocypec, supra note 47, at pp. 361, 365, 372.

53. E.g., The Indonesian government has blamed the decline of that nation's fishing industry in the Strait of Malacca on the increased traffic in that waterway, U.N. Doc. A/AC.138/SC II/SR. 31 (1972), pp. 111-12.

54. The 1958 Geneva Convention on the Continental Shelf grants the coastal state the right to explore and exploit the natural resources over the continental shelf, and to construct the necessary installations for such activities; these, however, cannot cause "any unjustifiable interference with navigation, fishing, or the conservation of the living resources of the sea," and these installations shall not be erected "where interference may be caused to the use of recognized sea lanes essential to international navigation," 499 U.N.T.S. 311, arts. 2.1, 5.1, 5.2, 5.6.

55. Though the Territorial Sea Convention of 1958 expressly allows the coastal state to forbid fishing by vessels transiting in innocent passage through the territorial sea, this prohibition would not apply to straits or sections of straits measuring more than twice the breadth of both territorial seas. Since straits are by definition of limited width, and traffic is concentrated in that area, the strait states are at a worse disadvantage than non-strait coastal states in competing with foreign fishing fleets off their coasts. See F. Nolta, *supra* note 30, at pp. 826-27. This problem, would, of course, be ameliorated by the adoption internationally of a 12-mile territorial sea and a 200-mile economic zone.

56. E.g., see comments by representatives of Spain and Indonesia before U.N. Committee on Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, U.N. Doc. A/AC. 138/SC. II/SR. 42 (1972), p. 53; U.N. Doc. A/AC. 138/SC. II/SR. 31 (1972), pp. 112-13. See *infra* note 84.

57. E.g., The Battle of Sunda Strait. See S.E. Morison, *History of United States Naval Operations in World War II*, Vol. III (London, 1948), pp. 363-70.

58. This argument would be interesting in view of the U.N. resolutions granting states the right to sovereignty over their natural wealth and resources. See G.A. Res. 626 (VII), Dec. 21, 1952, *Yearbook of the United Nations, 1952*, p. 390; G.A. Res. 1803 (XVII), Dec. 19, 1962, rep. in 2 *International Legal Materials* (1963), p. 223, arts. 1, 8. See also International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200 (XXI), Dec. 16, 1966, rep. in 6 *International Legal Materials* (1967), p. 360, art. 1.2.

59. The adoption of a 12-mile territorial sea, thus bringing most of the world's important straits into the territorial seas regime, would render this argument all the more interesting.

It can also be argued that straits should provide a source of domestic revenue, or at the least cover the costs of services essential to passage, through a levying of tolls. The Montreaux Convention of 1936, which governs passage through the Turkish Straits, permits Turkey to collect taxes and charges from passing vessels on a tonnage basis for services rendered, including maintenance of sanitary control stations, lighthouses, buoys, and lifesaving services, Convention Regarding the Regime of Straits (Montreaux Convention), July 20, 1936, 173 L.N.T.S. 213, 7 Hudson, *International Legislation*, 386 (1941), arts. 2-5. For a description of the various navigational aids and maintenance required to ensure the safe passage of vessels through straits see W.G. Grandison and V.J. Meyer, "International Straits, Global Communications, and the Evolving Law of the Sea," 8 *Vanderbilt Journal of Transnational Law* (Spring, 1975), p. 446.

60. The other six being sovereignty, recognition, consent, good faith, self defence, and international responsibility, G. Schwarzenberger, International Law, Vol. 1: International Law as Applied by International Courts and Tribunals, 3rd. ed. (London, 1957), pp. 9-10. See also C.J. Colombos, The International Law of the Sea, 6th Rev. ed. (New York, 1967), pp. 47-48; W. Friedmann, The Future of the Oceans (New York, 1971), p. 3; I. Brownlie, Principles of Public International Law, 2nd ed. (London, 1973), p. 234. See, however, S.A. Swarztrauber, The Three-mile Limit of Territorial Seas (Annapolis, Md., 1972), pp. 1-2, 254-57.

61. For an exhaustive account of the evolution of the doctrine of the freedom of the seas, see T.W. Fulton, The Sovereignty of the Seas (Edinburgh and London, 1911).

62. 450 U.N.T.S. 82.

63. Colombos, supra note 60, at p. 66; see also L. Henkin, Law for the Seas Mineral Resources (Washington, 1967), pp. 27-36.

64. G. Gidel, Le Droit International Public de la Mer, Vol. 1, (Chateauroux, 1932), p. 208.

65. For a description of the actual and planned uses of the sea see P.S. Rao, "Competing Uses of the Sea," Ch. 5 of The Public Order of Ocean Resources: A Critique of Contemporary Law of the Sea (Mass., 1975), pp. 109-65.

66. United Nations Statistical Yearbook, 1976 (New York, 1977), p. 146.

67. U.S. Dept. of Commerce, A Statistical Analysis of the World's Merchant Fleets... as of December 31, 1975 (Washington, D.C., 1975), p. 1.

68. J.L. Jacobson, "Future Fishing Technology and its Impact on the Law of the Sea," in F.T. Christy, et. al., (eds.), Law of the Sea: Caracas and Beyond (Cambridge, Mass., 1975), pp. 237-50.

69. J.A. Knauss, "Factors Influencing a U.S. Position in a Future Law of the Sea Conference," Law of the Sea Institute Occasional Paper #10 (Rhode Island, April, 1971), p. 9.

70. Lloyd's Register of Shipping, Statistical Tables 1976 (London, Nov., 1977), p. 59.

71. See supra notes 12-14, and accompanying text.

72. J.T. Swing, "Who Will Own the Oceans?," 54 Foreign Affairs (April, 1976), p. 535.

73. Knauss, supra note 69, at p. 12.

74. See "Mineral Resources of the Sea," U.N. Doc. ST/ECA/125 (1970), p. 14.

75. See L.C. Green, "The Impact of New States in International Law," in Green, Law and Society (Leiden, 1975); M.A. Ajomo, "Third World Expectations," in R. Churchill, et. al., (eds.), New Directions in the Law of the Sea, Vol. III (New York, 1973), pp. 302-10.

76. S. Rosenne, supra note 34, at p. 37.

77. Though it can be argued that, as far as the 3-mile rule is concerned, the 1958 Convention was declaratory of an already existing and mandatory rule of customary international law. See The Judgement of the International Court of Justice in the North Sea Continental Shelf Case (1969) I.C.J. Rep., p. 3, at paras. 74-81.

78. See H.S. Amerasinghe, "The Third United Nations Conference on the Law of the Sea," 6 Unitar News (1974), pp. 2-3.

79. See R.Y. Jennings, "A Changing International Law of the Sea," 31 Cambridge Law Journal (1972B), pp. 32-50. See also infra note 86 and accompanying text.

80. See M.A. Ajomo, supra note 69. At the Third United Nations Conference on the Law of the Sea, this grouping, also known as the "Group of 77" though now numbering well over 100 states, has been exerting a major influence. See J.R. Stevenson and B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session," 69 American Journal of International Law, No. 4 (Oct., 1975), pp. 763-97.

81. See J.L. Jacobson, supra note 68, at pp. 237-47. In his dissenting opinion in a recent decision of the International Court of Justice whereby the Court indicated interim measures of protection concerning Iceland's proposed extension of its fisheries jurisdiction, Judge Padilla Nervo said:

> In a system of progressive development of international law the question of fishery limits has to be reconsidered in terms of the protection and utilisation of coastal resources regardless of other considerations which apply to the extent of the territorial sea.
> ... Not only Iceland, but many coastal states in all regions of the world, know by experience the harmful effects of the ever-greater threat of highly developed fishing effort near their shores by foreign fishing fleets equipped — like the modern trawlers of the United Kingdom — with sophisticated technical gear.

Fisheries Jurisdiction Case (United Kingdom v. Iceland) (1972) I.C.J. Rep., p. 12 at pp. 23-25. In its later judgement, the court, in finding that Iceland's unilateral extension of exclusive fishing rights to 50 nautical miles was not opposable to the United Kingdom, took into consideration the fact that

> It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former laissez-faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other states and the needs of conservation for the benefit of all.

Fisheries Jurisdiction Case (United Kingdom v. Iceland) (1974) I.C.J. Rep., p. 4, at p. 31.

82. R.B. McNees, "Freedom of Transit Through International Straits," 6 Journal of Maritime Law and Commerce (Jan., 1975), p. 188.

83. See S. Brown and L.L. Fabian, "Diplomats at Sea," 52 Foreign Affairs (Jan. 1975), p. 188.

84. The U.S.S. Pueblo, an electronic intelligence-gathering ship of the U.S. Navy, was seized by North Korean naval units on January 23, 1968, together with its crew of 81 officers and men of the U.S. Navy and two civilian oceanographic specialists. North Korea, which claimed a 12-mile territorial sea contended the ship was within that limit, while U.S. officials claimed she was at least 16 miles from the coast. The Pueblo was a converted 177-foot cargo ship of 906 dwt converted to a "geographic and electronic research ship" in 1967. Among her crew were 29 communication and decoding specialists who, under command of a U.S. navy lieutenant, operated electronics equipment designed to intercept radar and other electronic signals and gather information for intelligence. Her function was to steam along the coast of far-eastern Communist bloc nations intercepting military radio transmissions and plotting the location and operational frequency of radar installations, A. McClain, "The Pueblo Seizure in a Better-ordered World," 31 Univ. of Pittsburgh Law Review, No. 2 (Winter, 1969), pp. 255-57.

85. M.W. Mouton, in considering the conflicts between navigational interests and offshore gas and oil installations, states:

> We maintain that building construction in the high seas is using the freedom of the seas just as much as navigating on these seas, or fishing in these seas, or laying telegraph cables on the bottom of these seas. If Grotius had known about telegraph cables and oil derricks, he would have included them in the kind of use one can make of the high seas.

M.W. Mouton, The Continental Shelf (The Hague, 1952), p. 229.

86. Mr. Oyono Alogo, at 35th Plenary Meeting of July 10, 1974, U.N. Doc. A/CONF. 62/Official Records, Vol. I, pp. 145-46.

87. U.S. Dept. of State, Table of Territorial Sea Claims to November 8, 1977 (mimeographed), p. 1.

88. Arctic Waters Pollution Prevention Act, 9 International Legal Materials (1970), p. 543.

89. Prime Minister Trudeau's remarks to the press, April 8, 1970, 9 International Legal Materials (1970), pp. 600, 602-03. In a reply to the United States' reaction to Canada's legislation, the comments of Canada's Department of External Affairs were even more forthright:

> Canada reserves to itself the same rights as the United States has asserted to determine for itself how best to protect its vital interests, including in particular its national security. It is the further view of the Canadian Government that a danger to the environment of a state constitutes a threat to its security.
> The Canadian Government has long been concerned about the inadequacies of international law in failing to give the necessary protection to the marine environment and to ensure the conservation of fisheries resources. The proposed anti-pollution legislation is based on the overriding right of self-defence of coastal states to protect themselves against grave threats to the environment. Traditional principles of international law concerning pollution of the sea are based in the main on ensuring freedom of navigation to shipping states, which are now engaged in the large scale carriage of oil and other potential pollutants. Such traditional concepts are of little or no relevance anywhere in the world if they can be cited as precluding action by a coastal state to protect this environment....
> ... It is the considered view of the Canadian Government that neither existing customary international law nor contemporary conventional international law are adequate to prevent the continuing and increasingly rapid depletion of the living resources of the sea.

Canadian reply to the U.S. Government, April 16, 1970, 9 International Legal Materials (1970), pp. 608, 610-11, 614 (emphasis added). For an examination of Canada's action from the point of view of international law, see L.C. Green, "International Law and Canada's Anti-pollution Legislation." 50 Oregon Law Review (1970-71), pp. 462-90.

Canada's "pro-coastal/non-maritime" position on this issue would appear reasonable, since that country's is the fifth longest coastline in the world, Sovereignty of the Sea, supra note 1, at p. 18 et. seq. Canada also possesses a comparatively minor merchant fleet. As of December, 1976, its fleet numbered 70 vessels with a total tonnage of 530,000 dwt, roughly the equivalent of two modern supertanks, U.S. Dept. of Commerce, Merchant Fleets of the World (Washington, D.C., 1977), p. 2.

Canada is, on the other hand, a major fishing nation. Of the 55 states with an annual catch of 100,000 metric tons or more, Canada ranked 15 in 1973 with a catch of 1.15 million metric tons, F.A.O. Yearbook of Fishery Statistics, Vol. 36, 1973. Table AO-3, p. 17.

90. Office of the Geographer, U.S. Dept. of State, Map of World Straits Affected by a 12-mile Territorial Sea, No. 564375, Dec., 1974. See listing of straits in Appendix, p. 139.

91. See *infra*, Ch. III.

92. R.R. Baxter, The Law of International Waterways, with Particular Regard to Interoceanic Canals (Mass., 1964), p. 184.

93. E.F. Oliver, "Gargantuan Tankers: Privileged or Burdened?," U.S. Naval Institute Proceedings, Sept., 1970, p. 41.

94. For a report on a series of collisions and strandings explained only by poor seamanship, see Oceanology International, April, 1971, p. 20. See also N. Mostert, Supership (New York, 1974), Chs. 2 and 3. The margin of error in piloting a supertanker is minute when considering that a 200,000 dwt vessel would have a straight-line stopping distance for a crash stop of 2 1/2 miles and would take 25 minutes. During that period of "backing full" the ship's master is unable to steer the ship or regulate its speed, Oliver, *supra* note 93, at p. 39.

CHAPTER II: THE LEGAL NATURE OF STRAITS

A. THE POSITION OF STRAITS IN INTERNATIONAL LAW TO 1945

1. The Views of Publicists

a. 17th and 18th Century

The period leading up to and including the 17th Century witnessed state claims over large sections of the seas[1] with a gradual trend during the 18th Century toward limiting sovereignty to a specified belt of sea off a state's coast. It is, therefore, not surprising to find a negative — or at best cautious — approach on the part of the publicists and jurists of the time to the matter of passage of foreign vessels through appropriated areas of sea, or to the recognition of any special rule or exception in the case of passage through straits.

Hugo Grotius' views on the freedom of the seas were not, of course, representative of the prevalent doctrine or practice of the time. He deals with the appropriation of waters in straits in his De Jure Belli Ac Pacis (1623-24):

> ... It would appear that the sea also (like rivers) can be acquired by him who holds the lands on both sides, even though it may extend above as a bay, or above and below as a strait, provided that the part of the sea in question is not so large that, when compared with the lands on both sides, it does not seem a part of them.[2]

Not surprisingly, Grotius would exact a right of passage (for unarmed vessels) through these appropriated areas, especially since innocent passage through land territory, which is less necessary to the user and more dangerous to the owner of the territory cannot be denied.[3] He would, however, concede a right by the coastal state to levy a toll to compensate for the burden involved in keeping a passage navigable:

> It will not, therefore, be contrary to the law of nature or of nations if he who has taken upon himself the burden of protecting navigation and of making it safe by night-flares and marks indicating shoals shall impose a fair tax on those who sail.[4]

Even Selden in his Mare Clausum, a rebuttal to Grotius' Mare Liberum, while not admitting a right of passage, acknowledges — though arguing that this does not derogate from the dominion of the sea — that to prohibit innocent passage would be contrary to the dictates of humanity:

> The offices of humanitie require, that entertainment be given to strangers and that innoffensive passage be not denied them.[5]

Pufendorf, writing some 60 years after Grotius, recognizes the right of states to lay claim over adjacent areas of sea within 60 miles of shore. With regard to passage over these areas, Pufendorf acknowledges a form of obligation to permit passage, but with a stress on the safety and convenience of the sovereign. Addressing himself to the question of passage through lands, rivers, and appropriated parts of the sea, he states:

> ... the law of humanity does not obligate us to allow passage to any other merchandise than is necessary for the life of others... I confess that, in my opinion, it is scarcely possible to find any excuse for anyone desiring to deny a passage through the open sea that is subject to our jurisdiction, to unarmed vessels, when going to a nation with whom he is at peace...[6]

In an apparent reference to straits[7] Pufendorf recognizes a right on the part of the coastal state to charge tolls

> ... to meet the expenses incurred by the sovereign, in setting up marks to point out narrows or rocks, or in maintaining lighthouses to guide the course of ships by night, or in ridding the sea of pirates.[8]

According to Bynkershoek (1702), "The control of the land over the sea extends as far as cannon will carry; for that is as far as we seem to have both command and possession."[9] Allowing no exceptions for the territorial waters in straits, other than a right to collect tolls, he states:

> Transit or innocent passage, can be prohibited both on sea and land, despite the authority of Grotius. He who controls a strait, has legal right to command those who pass to pay tolls.
> For transit, even without weapons and without doing harm, may rightly be forbidden by an owner; this must be stated absolutely, though here again... (Grotius) (the mighty one) is against us. He denied this for both land and sea, but he has no support in law. No one, against my will, has any right to use and enjoy my property; the rule of humanity is one thing, that of the law is another.[10]

Vattel (1758) agrees with Bynkershoek in granting the coastal state a right to sovereignty over its marginal waters "as far as is necessary for its safety and as far as it can be effectively maintained."[11] Here, however, Vattel parts company with Bynkershoek by providing for a right of passage specifically through straits:

> It must be especially noted with regard to straits that when they connect two seas, the navigation of which is common to all or to several nations, the owner of the strait cannot refuse passage to the other nations, provided such passage be innocent and without danger to the owner. To refuse to do so without good reason would be to deprive those nations of an advantage which is granted to them by nature; and besides, the right to such passage remains to them from primitive common ownership.[12]

Vattel would, however, for "the care of its own safety," authorize the owner of the strait to "use certain precautions," and "exact certain formalities" in these straits, and in addition

> levy a moderate toll upon vessels which pass through, partly because of the inconvenience they cause in obliging the nation to be on its guard and partly as the price of the security

> given them against their enemies and against pirates, and of the expenditures entailed in the maintenance of lighthouses and buoys, and other things necessary to the safety of navigators.[13]

Wolff (1764) grants the state a right to sovereignty over "certain parts of the sea" that are unclaimed in the same way that unclaimed land can be appropriated, though no mention is made as to the limits of such appropriation. Straits, which he defines as a "narrow place in the sea... open at either end," are also subject to occupation.[14] Wolfe, however, would grant a right of passage to foreign vessels through these areas subject to the safety of the coastal state:

> Every nation has the right freely to navigate even the occupied seas, unless there should exist just fear of loss. Since by nature the right belongs to nations to things of harmless use which are subject to the ownership of another, the right freely to navigate occupied seas belonging to any nation is proved in exactly the same way as we have shown that the passage for reasonable causes through lands and rivers subject to ownership cannot be denied...
> But if, indeed, a nation in whose ownership a part of the seas is, shall have had reasonable fear of loss from permission to navigate... it is shown that the nation is not bound to allow navigation.[15]

He would also allow for the passage of armed vessels, where permission is first obtained.[16]

b. The 19th Century

The 19th Century, witnessing as it did a virtual abandonment of claims over large areas of the sea, also saw a more liberal attitude on the part of publicists toward rights of passage, especially in straits, since navigation through these passages came to be regarded as a corollary to the now generally-accepted principle of freedom of the seas. Wheaton, writing in 1846, would grant a right of passage through straits —

though not to armed vessels — whether they comprise territorial waters or high seas, resting on their function as a channel of communication:

> Straits are passages communicating from one sea to another. If the navigation of the two seas thus connected is free, the navigation of the channel by which they are connected ought also to be free. Even if such strait be bounded on both sides by the territory of the same sovereign, and is at the same time so narrow as to be commanded by cannon shot from both shores, the exclusive territorial jurisdiction of that sovereign over such strait is controlled by the right of other nations to communicate with the seas thus connected. Such right may, however, be modified by special compact, adopting those regulations which are indispensably necessary to the security of the state whose interior waters thus form the channel of communication between different seas, the navigation of which is free to other nations. Thus the passage of the strait may remain free to the private merchant vessels of those nations having a right to navigate the seas it connects, whilst it is shut to all foreign armed ships in time of peace.[17]

Woolsey (1860) argues that claims of exclusive control over parts of the sea such as "narrow seas not shut up within the territory of a single state," and "narrow passages, especially such as lead to interior seas" are "either doubtful or to be rejected," and advocates freedom of passage through them at least for merchant vessels, since no mention is made of armed ships:

> ... the views of the world, in regard to the freedom of commerce, have become much more enlarged. What Grotius contended for his mare liberum against the exclusive claim of Portugal to the possession of oriental commerce, "jure gentium quibusvis ad quosvis liberam esse navigationem," is now for the most part admitted, and the pathways of commerce can no longer be obstructed.[18]

James Kent, though not referring specifically to straits, would oblige a state to grant passage in time of peace over its land and seas provided no threat is presented to the interests of the sovereign state:

> Every nation is bound, in time of peace, to grant a passage for lawful purposes, over their lands, rivers, and seas, to the people of other states whenever it can be permitted without inconvenience; and burthensome conditions ought not to be annexed to the transit of persons and property. If, however, any government deems the introduction of foreigners, or their merchandize injurious to those interests of their own people which they are bound to protect and promote, they are at liberty to withhold the indulgence.[19]

Hall (1883) advocates an actual right of navigation through straits based on the essential character of these waterways to commercial navigation. For this same reason, this right would not extend to vessels of war.

> In all cases in which territorial waters are so placed that passage over them is either necessary or convenient to the navigation of open seas, as in that of marginal waters or of an appropriated strait connecting unappropriated waters, they are subject to a right of innocent use by all mankind for the purposes of commercial navigation.... The right... must be considered to be established in the most complete manner.
>
> This right of innocent passage does not extend to vessels of war. Its possession by them could not be explained upon the grounds by which commercial passage is justified. The interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all states. But no general interests are necessarily or commonly involved in the possession by a state of a right to navigate the waters of other states with its ships of war.[20]

Wharton (1886) draws upon analogies with international rivers and interoceanic canals. Using such an analogy in referring to transit though the proposed Panama Canal, he states:

> ... navigable water-courses which traverse the dominions of two or more sovereigns, and on the freedom of which the commerce of the world in part depends, cannot without a wrong to the commercial world as a whole, be permanently obstructed by any one of the sovereigns by whom their banks are controlled. This was the position taken by the United States in its controversy with Denmark as to the Sound, and such is now the view of the leading European powers as to all great thoroughfares of trade not enclosed entirely within the realm of one particular sovereign.[21]

c. Early 20th Century

Writers in the early part of the 20th Century for the most part acknowledged a right of innocent passage through territorial straits, the question now being that of determining what constitutes innocent passage. To Taylor (1901) both merchantships and warships of states at peace with the coastal state enjoy a right of innocent passage through territorial straits, so long as they "abstain from all illegal acts and... observe all reasonable regulations." Likening the passage of foreign warships to the treatment accorded ambassadors, he argues that a state cannot forbid the passage of a man-of-war "even when they purpose to attack an enemy's vessels, or to bombard or blockade his ports." These rights inherent to both merchant vessels and warships, however, are accorded only in straits connecting "two parts of the high seas."[22] Taylor makes no mention of straits connecting open seas with inland seas or with territorial waters.

Westlake (1904) adopts a novel and liberal approach. Addressing himself to the case of territorial straits, he advocates a right of innocent passage, though dependent on "the existence of a lawful destination beyond it for the sake of which such passage is desired." For straits connecting two open seas (e.g., the Strait of Magellan) "the ulterior destination is clear, and there is a right of transit both for ships of war and for merchantmen." However, if a strait is bordered by a single country and leads into an inland sea lying wholly within that same country (e.g., up to 1774, the Bosphorus leading into the Black Sea), "it will be within the right of that country to exclude foreign navigation from its internal waters, and consequently from the strait which leads to them." If the inland sea to which the strait leads is bordered by two or more states (e.g., the Black Sea after 1774; the Baltic) each of these states – whether they border the strait itself or not – would have the right to permit ships to enter from – and exit to – the open sea. This would apply to foreign military and merchant vessels as well as those of the states bordering the inland sea. Moreover, though the ships may be entering and exiting "for purposes of war," Westlake would consider this "a lawful ulterior destination in each direction, carrying the right of innocent passage through the strait."[23] Westlake's arguments run directly counter to Hall's thesis that warships have no right of innocent passage since "no general interests are necessarily or commonly involved in the possession by a state of a right to navigate the waters of other states with its ships of war."[24] According to Westlake "a ship of war as well as a merchantman may have a lawful errand beyond the littoral sea in question."[25]

This emphasis on the character of the passage rather than the nature of the ship is also advocated by Lawrence. Writing in 1915 he argues for a rather sweeping right of innocent passage through straits, both for merchantships and armed vessels at peace with the coastal state. Referring specifically to territorial straits connecting high seas he states:

> ... the common law of nations now imposes upon all maritime powers the duty of allowing a free passage through such of their territorial waters as are channels of communication between two portions of the high seas. The right thus created is, of course, confined to vessels of states at peace with the territorial power, and is conditioned upon the observance of reasonable regulations and the performance of no unlawful acts. It extends to vessels of war as well as to merchant vessels. No power can prevent their passage through its straits from sea to sea, even though their errand is to seek and attack the vessels of their foe, or to blockade or bombard his ports. As long as they commit no hostile acts in territorial waters, or so near them as to endanger the peace and security of those within them, their passage is perfectly 'innocent.'[26]

Lawrence would grant this right as well in the case of straits leading to inland seas.[27]

Lawrence's views are based on the role of straits as an integral part of the freedom of the seas:

> ... as the old idea of appropriating the ocean gave way to the doctrine that it was free and open to all, it was felt that the navigation of straits that connected two portions of the high seas was an adjunct to the navigation of the seas themselves, and should be as free in one case as in the other.[28]

Oppenheim (1912) adopts a more restrictive view. Arguing that the rules of international law "concerning navigation, fishery, and jurisdiction within the maritime belt apply likewise to navigation, fishery, and jurisdiction within straits," Oppenheim would grant a right of passage to merchantships only in territorial straits connecting two parts of the open sea. In the case of a territorial strait belonging to one state and connecting a part of the open sea with a territorial gulf or bay, or with a territorial land-locked sea belonging to the same state, foreign vessels can be denied passage. Moreover, in the case of foreign warships, these would only be admitted "to such straits as form part of the highways for international traffic."[29]

Hershey (1923), in contrast to Oppenheim, would grant a right of innocent passage to foreign merchantships both in territorial straits connecting two open seas and in straits connecting open seas to territorial bays, gulfs, or marginal seas. Like Oppenheim, though, he would allow men-of-war a right of passage through a territorial strait only if such a strait forms an international highway.[30]

Hyde (1922) would grant a right of passage in territorial straits joining two open seas, though the question of passage of warships is unclear:

> ... a territorial sovereign ought to be permitted to protect itself as against hostile acts in time of peace and war.... The mode of protection should, however, be one designed to oppose the least possible obstacle in the way of navigation.[31]

In the case of territorial straits with both termini or with the entire strait lying within the domain of a single state, Hyde would not consider this a reason to bar its use by foreign ships as long as "two different seas are thus connected and the use of the waterway a matter of vital concern to commerce generally."[32]

2. State Practice to 1945

a. Merchant Vessels

Under the customary law developing through the late 18th and early 19th Centuries, a territorial sea of 3 miles became a fairly well established rule of international law, reaching its peak in the early 20th Century.[33] Because of this prevailing limit, most straits of major importance, being over 6 miles wide, contained high seas corridors through which a right of navigation was established under the customary regime of the high seas. However, a right of innocent passage for merchantships through the territorial sea having been established since the middle of the 19th Century, passage through territorial straits was a logical corollary. In Bruel's words,

> This right (of innocent passage) being already granted to them in 'ordinary' territorial waters, there was all the reason to assume that this right also was due to those vessels in that part of these waters which is particularly important to shipping, by serving as the natural thoroughfares of commerce between two oceans or parts thereof.[34]

Exceptions to this general rule produced special legal regimes in territorial straits that accommodated the interests of coastal states with the interests of states that relied on passage through those waterways. The foremost examples of these regimes are those that governed the Turkish and the Danish Straits. The Turkish Straits control access into the Black Sea which, from the Turkish annexation of Constantinople in 1453 to the Russian conquest of Crimea in the 18th Century, was entirely surrounded by Turkish territory. During that time, not surprisingly, foreign warships were denied passage and merchant vessels were allowed passage only at the discretion of the Ottoman Porte. Turkey was forced by Russia in 1774[35] and later through several treaties with Great Britain and other powers to open the straits first for merchantships and later for a limited number of warships.[36] Since 1936 the straits have been governed by the Montreaux Convention establishing freedom of transit for merchant vessels in time of peace and war.[37]

Like the Turkish Straits, the Sound and the two belts comprising the Danish Straits had been under coastal state control, sanctioned by a series of treaties and arrangements with the powers of Europe, which allowed Denmark to collect heavy tolls from passing vessels. Protests, especially from the United States and Great Britain, culminated in the 1857 Treaty of Copenhagen abolishing the tolls.[38]

The relatively few territorial straits of international importance — under the prevailing 3-mile limit — that could become the source of controversy,[39] as well as the minor threat to the littoral state's resources posed by the merchant shipping of the time, precluded the existence of undue coastal state concern. Bruel, in his definitive work, reached the conclusion that the right of passage of merchant vessels through territorial straits was established by the time of the First World War,[40] and the practice to 1945 presents no evidence to the contrary.[41]

b. Warships

The practice as to the passage of warships was less clear. The publicists of the various periods prior to the Second World War differed as to whether passage of warships was a matter of right or a mere privilege susceptible of being withdrawn by the coastal state. However, as McDougal points out, the debate did not reflect any real corresponding divergence in state practice since, for the most part, states permitted the passage of warships through territorial straits in time of peace.[42] The more notable exceptions were, of course, those afforded by the Turkish and Danish Straits. The Ottoman Empire's traditional policy was to prohibit the passage of foreign warships through its straits, and despite occasional concessions to Russia for passage of its Black Sea fleet, the Empire and later Turkey continued to resist the transit of foreign warships. The Montreaux Convention of 1936 imposes conditions on the passage of warships, involving restrictions regarding types of vessels, tonnage of vessels, prior notice of transit, and the outright prohibition of transit should Turkey consider herself threatened with imminent danger of war.[43]

In the case of the Sound and Belts, Denmark historically had prohibited the passage of foreign warships, with restrictions continuing to be placed on warships long after the Sound Dues Treaty opened the straits to the unrestricted innocent passage of merchant vessels.[44] Since 1918, however, the trend was for Denmark to reduce and finally to eliminate unilateral restrictions (principally notice requirements) on foreign warships using the straits.[45] Colombos points out that though not resting on a conventional basis, the use of these straits, even by belligerent warships (when Denmark is neutral), has been established by practice.[46]

The case of the Strait of Magellan is one which one commentator considers as evidence of a trend since the late 19th Century toward declining coastal state competence over warships in territorial straits used for international navigation.[47] Following the independence of the Spanish colonies the control of the Straits became an issue between Chile and Argentina. Maritime states accustomed to using the channel protested against any attempt to place them under coastal state control. The widespread concern induced Chile and Argentina to conclude a treaty in 1881 neutralizing the Straits forever and providing for free navigation by ships (including warships) of all nations.[48]

The 1930 Hague Codification Conference, though not successful in producing a treaty, did, through its Committee on Territorial Waters, distinguish between the passage of warships through straits and through the territorial sea in general. With regard to the latter, the draft article stated:

> As a general rule, a coastal state will not forbid the passage of foreign warships in its territorial sea and will not require previous authorization.[49]

The accompanying Observation states that "... existing practice leaves to states the power, in exceptional cases, to prohibit the passage of warships in its territorial sea," though the same Observation states that "under no pretext... may there be any interference with the passage of warships through straits constituting a route for international traffic between two parts of the high seas."[50] Though the Observations were never accepted by the Conference as a whole, and the articles themselves were approved only as a basis for further negotiation, it can at least be argued that some measure of agreement on this issue was evident at the time.[51]

When considering the overall paucity of genuine conflict up to the time of the Second World War, with states placing restrictions on the passage of warships through straits only as an exceptional measure[52] and the scarcity of jurisprudence dealing with the question, it is difficult to disagree with Bruel when he concluded (in 1939) that, while "a right proper" for warships to pass through territorial waters not constituting straits could not be assumed to exist, though in practice such a right was, for the most part, accorded by all states in time of peace, such a right "on principle" existed for their passage through territorial straits in time of peace, subject to the primary condition of innocence.[53]

B. THE POSITION OF STRAITS IN INTERNATIONAL LAW AFTER 1945

1. The Corfu Channel Case

The landmark international judicial decision affecting the nature of passage through straits was the 1949 decision in the *Corfu Channel* case,[54] submitted to the International Court of Justice in 1947. In October, 1946 two British warships were heavily damaged by mines while passing through the North Corfu Strait within Albanian territorial waters.[55] The United Kingdom claimed its warships had a right to transit the strait, that Albania was in violation of international law and international custom in mining an international strait and in failing to warn the warships of the danger to their navigation in the area. Albania contended that the North Corfu Channel was not an international strait, that British warships were not entitled to transit the straits without her consent, and that the particular passage of British ships on October 22 had not been innocent in character. The Court reached the decision that Albania was responsible under international law and would have to pay compensation to the United Kingdom for having failed to give proper warning to the British warships of the existence of mines in those waters.[56] As for the right of warships to transit Albania's territorial waters comprising the strait the Court stated:

> It is, in the opinion of the Court, generally recognized and in accordance with international custom that states in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal state, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal state to prohibit such passage through straits in time of peace.[57]

The Court, in finding that the North Corfu Channel belonged "to the class of international highways through which passage cannot be prohibited by a coastal state in time of peace"[58] combined the geographic criterion with that of use:

> It may be asked whether the test is to be found in the volume of traffic passing through the strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographic situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas.[59]

The Court considered that it is not a requirement that an international strait be "necessary," so long as it is a "useful route for international maritime traffic."[60]

In rejecting Albania's charges that the transit had been conducted in a non-innocent manner and that warships are inherently non-innocent because of their function or configuration, the Court determined that it is not the character of the vessel, but the manner in which the passage is carried out that determines innocence.[61] In fact, the Court did not accept the Albanian contention that the passage of the British warships was conducted in a threatening manner. Rather, it concluded from an examination of the warships' behaviour (e.g., proceeding in a line one after the other, ships' guns trained for and aft) that this was not inconsistent with the roles of innocent passage, despite the fact that the United Kingdom admitted that its motive for passage was not only for purposes of navigation, but also to test the Albanian attitude and to "affirm a right which had been unjustly denied."[62] The Court also concluded that "the intention must have been, not only to test Albania's attitude, but at the same time to demonstrate such force that she (Albania) would abstain from firing again on passing ships."[63] The Court concluded that these measures did not constitute a violation of Albania's sovereignty by the United Kingdom.[64]

Though the Corfu Channel Case is subject to conflicting views,[65] the decision itself can be viewed as a rather sweeping assertion of international community rights in straits establishing, by the first definitive decision by an international tribunal, the right of warships as well as merchant vessels, to transit international straits in time of peace.

2. The International Law Commission and the First Law of the Sea Conference

The International Law Commission, charged with preparing a draft for the 1958 Conference on the Law of the Sea, relied heavily on the Corfu Channel decision in deliberating the question of passage through straits.[66] In its final report to the United Nations General Assembly in 1956, it recommended the following draft article (17.4) for consideration by the 1958 Conference:

> There shall be no suspension of the innocent passage of foreign ships through straits normally used for international navigation between two parts of the high seas.[67]

The 1958 Conference, however, made two significant changes in the draft article. First, in an effort to widen the category of straits to which innocent passage would apply, deleted the word "normally." Second, it made innocent passage apply not only to straits situated between high seas, but also to those located between high seas and the territorial sea of a foreign state. The final provision (article 16.4) approved by the Conference reads:

> There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state.[68]

In this manner, state practice hardening into customary law combined with the rather broad conception of passage through straits evidenced in the Corfu Channel decision, which was reaffirmed and further liberalized by the 1958 Territorial Sea Convention. These today remain the legal instruments governing transit through straits.

3. The Views of Publicists after 1945

Publicists writing after the Corfu Channel decision and the 1958 Territorial Sea Convention not surprisingly subscribe to these two authoritative sources, though the question of the passage of warships through international straits and the conditions under which the coastal state can restrict or deny passage — even as regards merchant vessels — remains unsettled. Writers specializing in the law of the sea share few common views on the subject. To H.A. Smith, writing in 1959, and referring to areas of the territorial sea not necessarily constituting straits, the 1958 Convention

> ... evades the question of a legal right of passage (for warships)... (though) in any case it is certainly open to the shore state to prohibit or restrict the passage of warships for special or temporary reasons, such as may arise during a period of international tension.[69]

McDougal and Burke (1962), however, would permit a state to deny passage through international straits only in cases of the "highest expectations of violence":

> ... mere passage through straits cannot be interdicted for any reason other than as a threat to important coastal interests, i.e., a passage which is not innocent in the most comprehensive sense. The coastal state is not authorized, either by the 1958 Convention or by customary international law principles to prohibit passage without specifying cause.[70]

According to Baxter (1963), nothing in the law and practice after 1945 has done anything to call into question the accuracy of Bruel's conclusion regarding the existence — established before the First World War — of a right of passage for merchant vessels through international straits. With regard to warships, however, Baxter concludes that the general right of passage through international straits in time of peace as enunciated in the Corfu Channel case was "obscured" by article 23 of the 1958 Convention.[71] Colombos (1967) affirms the right of passage afforded by the Corfu Channel decision and the 1958 Convention, but contributes some novel conditions:

> The riparian state is, however, entitled to take all precautions required for its security: for instance, in limiting the numbers of ships of war allowed to use the strait at the same time, or the length of their stay there.[72]

The views of other contemporary publicists in international law are even more varied. To Sir Gerald Fitzmaurice (1959) the 1958 Convention is both clear and unequivocal in its treatment of passage through international straits:

> It is clear that where the territorial sea in question is part of an international strait as defined in paragraph 4 of Article 16, the effect of that provision is to give, or rather to declare, the general international rule of an absolute right of passage through such straits in all circumstances, and without right of suspension on the part of the Riparian states, both for merchant ships and warships. (emphasis added)[73]

Referring to the passage of warships through parts of the territorial sea not necessarily constituting straits he states:

> The Convention creates no special regime for the passage of warships and does not place upon them any special disabilities as compared with merchant ships, or subject them to any conditions or restrictions

> to which the latter are not subject, but gives them exactly the same rights. (emphasis added)[74]

Jessup, also writing in 1959, and referring to territorial waters not necessarily constituting straits, is less certain of rights of passage for warships. In his view "the implication (of the 1958 Convention) is that warships do have the right of innocent passage," but admits that the relevant parts of the text are "confusing."[75] However, to Tunkin, chairman of the Soviet delegation to the 1958 Conference, passage of warships amounts to a privilege conditionally granted by the coastal state. Writing in 1959, and also referring to areas of the territorial sea not necessarily constituting straits, he states:

> It is generally recognized under international law that merchant and other non military vessels have the right of unhindered passage through the territorial waters of a foreign state, provided they use the customary shipping routes. (However) the coastal state has the right to lay down any rules it wishes regarding the passage of warships, including a requirement that preliminary notification be given or permission obtained. (emphasis added)[76]

To Starke (1972) the Corfu Channel decision and the 1958 Convention support

> a right of innocent passage through such straits as form part of an international highway... both to foreign merchant shipping and to foreign men of war... (though) there is some dispute... as to whether warships have at all times a right of passage through straits constituting an international highway and consisting wholly of territorial sea.[77]

To Brownlie (1973) the matter of passage of warships is also far from clear. In his view, there is a "general... right of innocent passage for foreign ships (with the possible exception of warships) through straits used for international navigation." Despite the Corfu Channel decision, however, the 1958 Convention "leave(s) the question of the passage of warships shrouded in obscurity."[78]

Alexander (1973) would place the emphasis on the character of the vessel or its cargo, rather than on the nature of the passage itself. He would consider the passage of merchant vessels through international straits as innocent unless they carry contraband, military cargo which "may in time be used" to threaten the coastal state's security,[79] or if the coastal state is at war with the flag state. Regarding the passage of warships, he considers this "probably the most contentious issue" relating to straits, and is of the view that though the mere passage of a military vessel poses little danger to the coastal state's peace, good order, or security, "the coastal states may, nevertheless, object to infringements of their sovereignty in coastal waters."[80]

To O'Connell (1975) the 1958 Convention served only to confuse the matter of passage through straits:

> As for the Geneva Convention, the one item on straits... was introduced as a proviso, and is perhaps the most unsatisfactory aspect of what is in many respects a not very satisfactory instrument. It brings the question of straits into the context of 'innocent passage' in the territorial sea, and so conveys the implication that transit through straits is no different in quality and scope from any transit through territorial waters, with the one qualification that it may not be suspended in emergency in the way that passage through territorial waters may be suspended. This imports into the text on straits the issue of whether warships have a right of innocent passage through the territorial sea without authorization (or at least notification). The range of uncertainties which the Geneva Text has thus enlarged may not have bothered naval staffs unduly in the past, but, as in the analogous case of the extent of the territorial sea, the progressive intensification of coastal state control of shipping in straits which is now observable is likely to

> lead to the widespread adoption of patterns of regulation which the naval powers cannot challenge without leading to a level of dispute which they are reluctant to contemplate.[81]

In the face of such varied and often conflicting views regarding the nature and extent of passage rights through international straits, it is convenient at this point to enter into an examination of the two legal sources regulating this matter.

REFERENCES TO CHAPTER II

1. By the end of the 17th Century the extravagant claims over whole parts of the oceans that had reached their peak during the 15th Century had begun to wane, though Venice still claimed sovereignty over the Adriatic, Sweden and Denmark over the Northern Seas between Iceland, Greenland and the coast of Europe, and English pretensions over the British Seas had still not been abandoned. T.W. Fulton, *The Sovereignty of the Sea* (Edinburgh and London, 1911), p. 552.

2. Hugo Grotius, *De Jure Belli Ac Pacis*: Libri Tres. Translated by F.W. Kelsey (1646 edition) (Indianapolis and New York, 1925), p. 209.

3. *Ib.*, p. 212.

4. *Ib.*, p. 214.

5. J. Selden, *Of the Dominion, or, Ownership of the Sea* (*Mare Clausum*), reprint ed. (New York, 1972), p. 123.

6. S. Pufendorf, *De Jure Naturae et Gentium, Libri Octo*, Vol. II. Translation of the 1688 edition by C.H. and W.A. Oldfather, in J.B. Scott (ed.), *The Classics of International Law* (New York and London, 1964), pp. 354-55, 358 (emphasis added).

7. Though the foregoing description would appear to refer to strait-like areas of sea, it could also apply to hazardous or shallow non-strait waters, since Pufendorf does not actually use the word strait. E. Bruel, in paraphrasing Pufendorf, tacitly assumes this as referring to straits, *International Straits: A Treatise on International Law* (Copenhagen, 1947), p. 51.

8. Pufendorf, *supra* note 6, at p. 360.

9. C. van Bynkershoek, *De Dominio Maris Dissertatio*, second edition (1744). Translated by R. van Deman Magoffin, in J.B. Scott (ed.), *The Classics of International Law* (New York, 1923), p. 44. According to W.L. Walker, Bynkershoek's work served mainly to "popularize" the cannon shot rule, which was already the practice of many states at the time he wrote, 22 *British Yearbook of International Law* (1945), pp. 211, 223.

10. *Ib.*, p. 57.

11. E. de Vattel, *The Law of Nations or the Principles of Natural Law*. Translation of the 1758 edition by C.G. Fenwick, in J.B. Scott (ed.), *The Classics of International Law* (New York and London, 1964), p. 108.

12. *Ib.*, p. 109.

13. Ib.

14. C. Wolfe, Jus Gentium Methodo Scientifica Pertractatum. Translation of the 1764 edition by J.H. Drake, in J.B. Scott (ed.), The Classics of International Law (New York and London, 1964), p. 72.

15. Ib., p. 183.

16. Ib., p. 184.

17. H. Wheaton, Elements of International Law, reproduction of the 8th edition (1866) of R. H. Dana, Jr., in J.B. Scott (ed.), The Classics of International Law (New York and London, 1964), p. 220.

18. T.D. Woolsey, Introduction to the Study of International Law (Boston and Cambridge, 1860), pp. 126, 128.

19. J.T. Abdy (ed.), Kent's Commentary on International Law, 2nd. ed. (Cambridge and London, 1877), p. 110.

20. W.E. Hall, A Treatise on International Law, 2nd. ed., (Oxford, 1884), pp. 141-42.

21. F. Wharton (ed.), A Digest of the International Law of the United States, Vol. III (Washington, 1886), p. 1; see also Vol. I, p. 77.

22. H. Taylor, A Treatise on International Public Law (Chicago, 1901), pp. 280-81.

23. J. Westlake, International Law, Part I: Peace (Cambridge, 1904), pp. 193-94.

24. Hall, supra note 20.

25. Westlake, supra note 23, at p. 192.

26. T.J. Lawrence, The Principles of International Law, 6th. ed. (Boston, 1915), pp. 194-96 (emphasis added).

27. Lawrence considers the special regime restricting the use of the Turkish Straits to be an "exceptional" one, "resting on treaty stipulations, and not on the common law of nations," ib., pp. 196-97.

28. Ib., p. 195.

29. L. Oppenheim, International Law: A Treatise, Vol. I: Peace, 2nd. ed. (London, 1912), pp. 266-67. (The First Edition of Oppenheim's text is not as extensive in its treatment of straits as is his Second Edition).

30. A. Hershey, The Essentials of International Public Law (New York, 1923), p. 202.

31. C.C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. I (Boston, 1922), p. 279.

32. *Ib.*

33. For a comprehensive account of the development of the 3-mile limit see S.A. Swarztrauber, *The Three Mile Limit of Territorial Seas* (Annapolis, Md., 1972).

34. Bruel, *supra* note 7, at p. 102.

35. See the Treaty of Kuchuk Kainarji (1774) G.B. For. Off., 3 *Peace Handbooks*, No. 15 (London, 1920), p. 67.

36. E.g., The Treaty of Andrianople (1829), *ib.*, at p. 70; Treaty of Paris (1856), *ib.*, at p. 78; Treaty of London (1871), *ib.*, at p. 81; Treaty of Berlin (1878), *ib.*, at p. 95.

37. Convention Concerning the Regime of Straits (Montreaux Convention), July 20, 1936, 173 L.N.T.S. 213, arts. 2-5, 8-22. See *infra* note 43 and accompanying text.

38. Treaty of Copenhagen of March 14, 1857, Martens, N.R.G., Vol. 16, Part 2, p. 345; see C.J. Colombos, *The International Law of the Sea*, 6th. ed. (New York, 1967), p. 199.

39. Important straits that close under a 3-mile rule are the Turkish, Danish, Singapore, Sunda, and Magellan.

40. Bruel, *supra* note 7, at p. 106.

41. See R.R. Baxter, *The Law of International Waterways* (Mass., 1964), p. 163; see also M. McDougal and W.T. Burke, *The Public Order of the Oceans* (New Haven and London, 1962), pp. 196-97.

42. McDougal and Burke, *supra* note 41, at p. 202.

43. Montreaux Convention, arts. 10, 13, 14, 18, 20, 21.

44. Bruel, Vol. II, at p. 45.

45. *Ib.*, pp. 99-100.

46. Colombos, *supra* note 38, at pp. 199-200.

47. F. de Rocher, *Freedom of Passage Through International Straits* (Florida, 1972), p. 67.

48. Boundary Treaty between Argentina and Chile, July 23, 1881, 12 Martens, N.R.G. 2nd. Ser. (1887), p. 491. See Bruel, Vol. II, pp. 200-49 for an exhaustive review of the history of these straits.

49. Conference for the Codification of International Law, Report of the Second Commission (Territorial Sea) (L.N. Pub. No. C. 230 M. 117-1930 V.) at p. 10.

50. Ib.

51. See McDougal and Burke, supra note 41, at p. 204.

52. Instances of closure of straits to warships have occurred mainly during time of war when the littoral state was at war. E.g., during World War Two, when Denmark was at war, the Danish Straits were mined, The Times (London), April 13, 1940, p. 4. The Danish Straits were also mined during the First World War, but merchant vessels were escorted through the mine fields, Bruel, Vol. II, p. 74. The Strait of Gibraltar was blockaded during an early stage of World War Two, but was later freely used as an avenue of approach for Allied warships during the invasion of North Africa, S.E. Morison, History of United States Naval Operations in World War II, Vol. II (London, 1947), p. 191. For a discussion of the Corfu Channel Case, see infra Part B, p. 58.

53. Though Bruel would grant the coastal state greater authority to regulate the passage of warships than would be the case with merchantships due to their "latent dangerousness," supra note 7, at pp. 202, 230-31.

54. Corfu Channel Case (merits) (1949) I.C.J. Rep., p. 4.

55. The North Corfu Channel separates Albania from the Greek Island of Corfu. It is less than a mile wide at its narrowest point, and less than 6 miles at its widest point.

56. (1949) I.C.J. Rep., p. 23.

57. Ib., at p. 28 (italics in the original).

58. Ib., at p. 29.

59. Ib., at p. 28.

60. Ib.

61. Ib., at p. 30.

62. Ib., at pp. 30-31. Approximately five months before, two British cruisers had been fired at by Albanian coastal batteries while transiting the channel, though neither of the vessels was struck, ib., p. 27.

63. Ib., at p. 31.

64. Ib.

65. See infra, pp. 74, 77-78.

66. In 1955 the members of the Commission gave express recognition to the Court's view by adopting a second paragraph to the draft article 24 (dealing with the passage of warships through the territorial sea). The second paragraph reads:

> (The coastal state) may not interfere in any way with innocent passage (by warships) through straits normally used for international navigation between two parts of the high seas.

Yearbook of the International Law Commission (1956), Vol. II, p. 277. The paragraph, however, was not included in the 1956 draft recommended to the United Nations General Assembly on the grounds that article 17.4 of the draft (see *infra* note 67 and accompanying text) barring the suspension of innocent passage through international straits sufficiently covered the matter, *ib*.

67. *Ib*., p. 258.

68. Convention on the Territorial Sea and the Contiguous Zone, Geneva, April 29, 1958, 516 U.N.T.S. 205.

69. H.A. Smith, *The Law and Custom of the Sea*, 3rd. ed. (London, 1959) p. 49.

70. McDougal and Burke, *supra* note 41, at pp. 189, 213.

71. Baxter, *supra* note 41, at pp. 162-63, 165, 167. Article 23 of the 1958 Convention states that a warship not complying with the regulations of the coastal state concerning passage through the territorial sea and disregarding requests for compliance can be required by the coastal state to leave the territorial sea. See *infra*, p.76.

72. Colombos, *supra* note 38, at p. 198. The precautionary measures suggested by Colombos are not contemplated in the 1958 Convention.

73. G. Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea," 8 *International and Comparative Law Quarterly*, 4th Series (1959), p. 102.

74. *Ib*., p. 103.

75. P.C. Jessup, "The United Nations Conference on the Law of the Sea," 59 *Columbia Law Review* (1959), p. 248.

76. G.I. Tunkin, "The Geneva Conference on the Law of the Sea," *International Affairs* (Moscow), No. 7 (1958), p. 48. Tunkin's view is consonant with the Soviet position, which in practice requires 30 days advance notice for passage of warships. In 1967, the Soviet government declared that the passage of two U.S. Coast Guard icebreakers through the Vil'kitski Straits would be a violation of Soviet frontiers. The exclusion was based on the fact that the vessels had not obtained prior permission 30 days before the date of passage, W.E. Butler, *The Soviet Union and the Law of the Sea* (Baltimore and London, 1971), pp. 66-69, 115. See also R.D. Wells, "The Icy 'Nyet'," 94 *U.S. Naval Institute Proceedings* (1968), p. 78.

77. J.G. Starke, An Introduction to International Law, 7th. ed. (London, 1972), p. 221.

78. I. Brownlie, Principles of Public International Law, 2nd. ed. (Oxford, 1973), pp. 273,-276.

79. Alexander does not indicate how he would determine whether such cargo threatens coastal state security.

80. L.M. Alexander, "Coastal State Competence to Regulate Traffic in Straits," in T.A. Clingan, Jr. and L.M. Alexander (eds.), Hazards of Maritime Transit (Cambridge, Mass., 1973), pp. 21, 23, 25.

81. D.P. O'Connell, The Influence of Law on Sea Power (Manchester, 1975), pp. 99-100.

CHAPTER III

THE CONTEMPORARY LEGAL ASPECTS: THE LEGACY OF THE CORFU CHANNEL CASE AND THE 1958 CONVENTION

A. COASTAL STATE JURISDICTION OVER THE TERRITORIAL SEA IN AREAS NOT CONSTITUTING STRAITS

The 1958 Convention describes the territorial sea as a belt of sea adjacent to a state's coast over which its sovereignty extends (art. 1, para. 1). Within this belt, however, the sovereignty of the coastal state is limited by the "right of innocent passage" enjoyed by ships of all states through this territorial sea (art. 14, para. 1). Passage is defined as "navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters" (art. 14, para. 2). As a rule, passage does not permit stopping or anchoring, unless made necessary by force majeure or distress (art. 14, para. 3).

The key concept of innocence is defined as a passage which "is not prejudicial to the peace, good order or security of the coastal state" (art. 14, para. 4). When passage is not innocent according to these terms, "the coastal state may take the necessary steps... to prevent passage" (art. 16, para. 1). Though the coastal state "must not hamper innocent passage through the territorial sea" (art. 15, para. 1), it may "suspend temporarily in specified areas of the territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security" (art. 16, para. 3). In addition to the prohibition on stopping and anchoring save in the case of force majeure or distress, the only other specific acts expressly considered as non-innocent are those where foreign fishing vessels fail to observe coastal state regulations forbidding fishing in the territorial sea (art. 14, para. 5), and where submarines fail to navigate on the surface and show their flag (art. 14, para. 6). Without reference to specific acts, a failure to comply with "the laws and regulations enacted by the coastal state... and, in particular, with such laws and regulations relating to transport and navigation" (art. 17) would also render the passage non-innocent. In all other cases the question of innocence remains couched in terms of what "is not prejudicial to the peace, good order or security of the coastal state." The use of such vague criteria can only occasion confusion and controversy.

THE DETERMINATION OF INNOCENCE

The International Court of Justice in the Corfu Channel case, in considering whether the passage of the British warships was innocent or not, laid stress both on the manner and motive of the passage.[1] By relying far more on the British version of the purpose as compared to Albania's version and by holding that the manner of the passage was indeed of a threatening character yet still within the bounds of innocence, it seems evident that the purpose of the passage was the criterion to which the Court gave greater weight.[2] The International Law Commission, however, appeared to take the view that the decision emphasized manner,[3] and in conformity with this view the draft article (15.3) in the recommendation to the U.N. General Assembly defined innocence in these terms:

> Passage is innocent so long as the ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal state....[4]

Vague though it is, the definition by laying stress on the acts of the ship, is of some value, in that it makes no reference to the configuration or purpose of the vessel, and provides, to some degree, a reasonably objective criterion for determining innocence. The Conference, however, rejected this draft,[5] and adopted instead the article (14.4) defining innocent passage in terms of what "is not prejudicial to the peace, good order or security of the coastal state." By shifting the stress from the "acts" of the ship to that of "passage," and adding two more interests ("peace" and "good order") with which passage would have to comply, article 14.4 would appear to have increased the subjective nature of the definition and broadened coastal state competence in determining innocence. While the conference record and state practice since that time do not support such a pervasive view,[6] it can well be argued that this definition would permit the coastal state to consider, in the determination of innocence, such factors as the destination of the vessel, its cargo, configuration, and even the state of relations between the flag state and the coastal state. Regardless of its acceptance as a compromise definition, the Conference could hardly have chosen more nebulous criteria.[7]

It is also unclear to what extent warships enjoy a right of innocent passage. Article 14, dealing with innocent passage, appears under the heading of sub-section A, titled "Rules Applicable to All Ships" (emphasis added). The only reference to warships is made in the single article (23) under sub-section D titled "Rules Applicable to Warships" which reads:

> If any warship does not comply with the regulations of the coastal state concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal state may require the warship to leave the territorial sea.

The question then becomes whether the "rules applicable to all ships" apply to warships, and if so, what limits does article 23 place on their right to passage? The Soviet jurist G.I. Tunkin argues, for example, that the "regulations" the warships must comply with according to article 23 could well include the requirement of prior permission or prior notification.[8] While this position is not supported by the actual practice of states, the probable adoption of a 12-mile rule and the increasing concern of littoral states over their coastal waters is bound to result in an intensification of opposing community interests which could affect especially this particular question.

B. COASTAL STATE JURISDICTION IN TERRITORIAL WATERS CONSTITUTING STRAITS

As stated earlier,[9] a strait in the geographic sense can be viewed simply as a narrow sea channel separating two adjacent landmasses and joining two larger bodies of water. Of these there are literally thousands, the overwhelming number of which do not concern us, since they consist either of internal waters over which the respective state is sovereign and through which no right of passage is recognized or of high seas waters over which the coastal state has no jurisdiction and through which foreign vessels enjoy freedom of navigation.[10] For the purposes of this study we are concerned with those straits partially or entirely enclosed by territorial waters, in such a way that vessels must traverse through a portion of the territorial sea in order to navigate the channel. These straits are referred to as legal straits[11] or territorial straits, for it is only through these waters that foreign vessels enjoy a right of innocent passage. Under the traditional 3-mile rule there are relatively few territorial straits (i.e., those with widths at some point being equal to — or less than — 6 miles) of significance to international navigation. Under an impending 12-mile rule, however, a large number of territorial straits will be created, over 100 of these being important to international navigation.[12]

An additional qualifying factor is the international character of the strait. The 1958 Territorial Sea Convention provides for a special application of the principle of innocent passage to navigation through territorial straits "used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state," an innocent passage right which cannot be suspended (art. 16.4). The requirement that the strait be one "used for international navigation" is a factor determining whether the right is a suspendable one or not. If a strait connects two parts of the high seas or part of the high seas with a territorial sea but is not used for international navigation, such a waterway would be governed by the general provisions guaranteeing a right of innocent passage through the territorial sea (art. 14) not necessarily constituting a strait. In such a case the coastal state would have the right to temporarily suspend innocent passage without discrimination amongst foreign ships if such action is "essential for the protection of its security"[13] (art. 16.3), since that waterway carries no special status beyond being ordinary territorial waters. The test of internationality then, is a crucial one for maritime states.

It will be remembered that in the Corfu Channel case[14] the Court asked "whether the test is to be found in the volume of traffic passing through the strait or in its greater or lesser importance for international navigation," and concluded instead that the decisive criterion is its "geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation."[15] The Court did not consider the criterion of necessity as decisive. Rather, it was sufficient that the waterway be "a useful route for international maritime traffic."[16] Neither did the Court consider decisive the fact that the Corfu Channel was an alternative passage between the Aegean and Adriatic Seas.[17] Granted the satisfaction of the usefulness criterion, the Court was referring only to straits joining high seas. It was this limitation that was removed by the 1958 Convention when it provided for non-suspendable innocent passage through international straits joining not only high seas, but also those connecting a part of the high seas with a territorial sea (art. 16.4). The Convention, however, took the criterion of "used for international navigation" espoused in the Corfu Channel decision and adopted it without any further qualifications.[18] Thus, despite the rather broad conception of internationality considered by the Court, the question of how much use or what manner of use is required to satisfy the criterion, remains obscure. Leo Gross, in commenting on the criterion used by the Court, the International Law Commission, and the Conference, asks:

> When or which straits are used? Does the answer depend on the density of the traffic, the habitual choice of a strait by a particular flag, the location of a recognized route or some such criterion or a combination of several criteria? It may also be noted that the word "international" qualifies navigation and is itself not free of ambiguity.[19]

As stated above, a strait not meeting the criterion of internationality laid down by the 1958 Convention would be governed by the general provisions of innocent passage through the territorial sea, a right which can be suspended for security reasons (art. 16.3), while a strait meeting the criterion would be governed by a non-suspendable right of innocent passage (art. 16.4). Hence, coastal state competence to restrict passage through the territorial sea is more limited in its international strait areas than in its non-international straits areas. It can readily be argued that due to the function of an international strait in serving as a link between oceanic realms, the coastal states competence should be more restricted in such areas. The suspension article (16.3), however, clearly indicates that what the coastal state is suspending for the protection of its security in its non-international strait area is innocent passage. An inconsistency here is apparent: why does article 14.4 consider a passage which is "prejudicial to the... security of the coastal state" as non-innocent, while article 16.3 would consider as essentially innocent a passage, the suspension of which is "essential for the protection of ... (the coastal state's) security," the only difference being that the suspension must be carried out without discrimination, temporarily, and after being duly published? Put in another way, how can it be essential for the protection of state security to suspend innocent passage when innocent passage is defined as one which is not prejudicial to the peace, good order or security of the coastal state? The argument can be made that what is being suspended is not an innocent passage as such, but all rights to transit for all foreign ships caused by some security threat which, while technically still "innocent," nevertheless merits suspension for security reasons. In order to determine whether suspension of all passage rights is essential to a state's security such an assessment would logically entail a far broader range of interests on the part of the coastal state than would be permissible in assessing a particular passage. Because of this wider discretion presumably allowed the coastal state in such an assessment, it is only reasonable that such a wide latitude be allowed solely in territorial seas _not_ constituting international straits. However, since the coastal state, despite the non-suspension article, still retains the right to prevent a _non-innocent_ passage through its international strait if such a passage threatens its "peace, good order or _security_," the argument would hold that the broad coastal state discretion implied in the general suspension article logically mitigates against any arbitrary or pervasive coastal state discretion in determining innocence according to the article 14.4 criteria ("not prejudicial to the peace, good order or security of the coastal state"). That is, coastal state pervasiveness in this latter case would render the general suspension article superfluous and allow that coastal state to conveniently avoid the prohibition of the straits suspension article. Despite this argument, however, the coastal state still retains the right to prohibit _non-innocent_ passage through international straits on the basis of what it _subjectively_ determines to be prejudicial to its peace, good order, or its _security_. Whether this security threat, in order for it to be considered as non-innocent, must be one produced by a specific passage or vessel rather than one caused by the passage of _all_ foreign vessels remains mere conjecture. It is submitted, however, that to expect the coastal state of its own accord to consider _any_ security threat as "_innocent_" (thus committing itself — under article 16.4 — to maintaining its strait open in the face of such a threat) when it can conveniently rely on the subjective criterion of article 14.4 to close its strait, is illusory.

It is apparent from the wording of the 1958 Convention that the possible prejudice to the "peace, good order or security" of the coastal state refers primarily to the threat posed by passing warships. Today, however, an equally great — or perhaps greater — threat to the coastal state is that posed by the passage of supertankers, a threat caused not only by the deep draft and lack of maneuverability of these vessels and, consequently, their greater potential for becoming involved in groundings or collisions, but by the added danger of disastrous oil spills.[20] The Institute of International Law, for example, concluded in 1969 that a ship not conforming to certain anti-pollution standards does pose a threat to the security of the coastal state and, consequently, can be denied passage through the territorial sea and contiguous zone.[21] Within the terms of the 1958 Convention, it can hardly be disputed that a passage threatening the marine environment is prejudicial to the "peace, good order or security" of the coastal state and is therefore of a non-innocent character.[22] This would apply even more so in the case of straits where, in many cases, the narrow passages would increase the likelihood of collisions, groundings, or spills, and where the proximity to shore poses a greater hazard to the coastal state than in a non-strait territorial sea area.

While there has been little serious controversy as yet regarding passage through territorial straits, the creation of over 100 territorial straits of importance to international navigation by an impending 12-mile rule, the present concern for the protection of offshore resources, and the real dangers posed by supertankers and other outsize carriers, is resulting in pressure being brought to bear by strait states on the maritime community involving transit restrictions through these waterways, many of which can conveniently fall within the vague innocent passage provisions of the 1958 Convention. While in many cases justified as far as the protective rights of coastal states are concerned, the ultimate loss to the fundamental freedom of the seas — caused by the restricted use of these international highways — could be considerable.

REFERENCES TO CHAPTER III

1. (1949) I.C.J. Rep., pp. 30-31.

2. See M. McDougal and W.T. Burke, *The Public Order of the Oceans* (New Haven and London, 1962), pp. 243-45; F. de Rocher, *Freedom of Passage Through International Straits* (Florida, 1972), pp. 84-85.

3. *Yearbook of the International Law Commission* (1956), Vol. I, pp. 200-01.

4. *Ib.*, Vol. II, at p. 258 (emphasis added).

5. The change resulted from an amendment submitted by the United States, U.N. Doc. A/CONF. 13/C.1/L.28/Rev. 1, *Official Records* (1958), Vol. III, p. 216.

6. The record of the conference, however, does appear to indicate that there was a marked intention to accord the coastal state a rather large measure of discretion in determining innocence, *ib.*, pp. 83-85; see McDougal and Burke, *supra* note 2, at p. 262.

7. In commenting on the Conference's choice of the terms "peace," "order," and "security" McDougal states that "few words of higher order of abstraction could have been found," *supra* note 2, at p. 262. A committee appointed by the American Bar Association to look into the main issues involved in the Law of the Sea negotiations in Caracas in 1974, in warning of the possible consequences of a 12-mile rule, called the criterion of innocence "a subjective test applied by the coastal states on an *ad-hoc* basis without meaningful international standards or guidelines," "Committee on the Law of the Sea: Information Report on the Law of the Sea," 8 *International Lawyer* (Oct., 1974), p. 693. See D.P. O'Connell, "The Juridical Nature of the Territorial Sea," 45 *The British Yearbook of International Law* (1971), pp. 303-85 for a comparative analysis of the differing degrees of jurisdiction exercised by littoral states over their territorial seas.

8. G. Tunkin, "The Geneva Conference on the Law of the Sea," 7 *International Affairs* (Moscow) (July, 1958), p. 49. According to R.R. Baxter, the "rules applicable to all ships" does apply to warships, and the article 23 "regulations... concerning passage" of warships should be read as rules of navigation, *The Law of International Waterways* (Mass., 1964), p. 168. See *supra* Ch. 2, pp.63-66.

9. *Supra*, p.16.

10. Convention on the High Seas, 450 U.N.T.S. 11, Art. 2.

11. See Baxter, *supra* note 8, at pp. 159-60.

12. For a listing of these straits see Appendix, p.139.

13. This would appear to mean, for example, that if NATO vessels were transiting within Canadian territorial waters, Canada would not be able to place restrictions upon Soviet vessels engaged in innocent passage unless it placed similar restrictions on vessels of *all* states, since to do otherwise would be discriminatory. See L.C. Green, "Sovereignty, Resources, and the Law of the Sea," in G. Stevenson and N. Hillmer (eds.) *A Foremost Nation* (Toronto, 1977), pp. 138-39.

14. (1949) I.C.J. Rep., p. 4. See *supra*, pp. 58-61.

15. *Ib.*, at p. 28 (emphasis added).

16. *Ib.* (emphasis added). It is interesting to note that Bruel, writing prior to the World Court judgement and the 1958 Convention, considered the test of internationality to lie in the "degree of importance of the particular strait to the international sea commerce," and in the requirement that "the interest attached to the *use* of these straits be world wide," the determination combining "the number of ships passing through the strait, their total tonnage, the aggregate value of their cargoes, the average size of the ships, and especially, whether they are distributed among a greater or smaller number of nations," *International Straits: A Treatise on International Law* (Copenhagen, 1947), pp. 42-43 (emphasis in the original). Bruel's criteria were, of course, precisely those argued by Albania and which the Court rejected when it found the volume of traffic and the importance of the strait to international navigation not to be decisive criteria.

17. (1949) I.C.J. Rep., p. 28.

18. The International Law Commission, in its Report to the General Assembly for consideration by the 1958 Conference, had recommended the expression "*normally* used for international navigation," arguing that the insertion of the word "normally" was "in conformity with the Court's decision," *Yearbook of the International Law Commission* (1956), Vol. II, p. 273 (emphasis added). See *supra* Ch. 2, notes 64, 65, and accompanying text.

19. L. Gross, "The Geneva Conference on the Law of the Sea and the Right of Passage Through the Gulf of Aqaba," 53 *American Journal of International Law* (1959), p. 587.

20. See *supra*, pp. 21-24.

21. "Measures Concerning Accidental Pollution of the Seas," Institute of International Law (Geneva, 1969), Art. VI. See also L.C. Green, "International Law and Canada's Anti-pollution Legislation," 50 *Oregon Law Review* (1970-71), pp. 476-87.

22. This is the view taken, for example, by D. Pharand, who also argues that the coastal state could adopt restrictive measures under the "sanitary regulations" stipulation of the 1958 Convention (art. 24), or under the general customary law of self-protection, *The Law of the Sea of the Arctic* (Ottawa, 1969), p. 12. These views are also held

by L.C. Green, supra note 21, esp. pp. 476, 484-87. See also Green, "Canada's Jurisdiction over the Arctic and the Littoral Sea," in G.T. Yates III and J.H. Young (eds.), Limits to National Jurisdiction over the Sea (Charlottesville, Va., 1974), p. 226.

CHAPTER IV

THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

A. BACKGROUND TO THE CONFERENCE

The various forces developing after the Second World War[1] contributed rapidly to the erosion of the 1958 Conventions. While the 1958 Conference essentially codified the customary law that had developed since the 19th Century, it was not long before many nations of the world began to claim wider territorial seas, continental shelves, and fishing zones. The technological revolution in such areas as deep sea mining, distant water fishing, and construction of supertankers, intensified the concern for protection of the marine environment, especially on the part of the developing states who insisted on a greater role in the management of their offshore waters. The growing pressure for the elaboration of new agreements to govern the use of ocean space resulted in the General Assembly Resolution 2750C (XXV) of December 17, 1970[2] calling for the convening of a conference on the law of the sea in 1973 that would deal with virtually all marine issues and draft a comprehensive law of the sea treaty.

The First (organizational) Session of the Conference was held in New York from December 3 to 15, 1973 for the purpose of dealing with routine and protocol matters. The Second (first substantive) Session was held in Caracas the following year from June 20 to August 29, 1974.[3] Beginning with this Session the Conference was structured on the basis of three Main Committees of the Whole: the First Committee, concerned with the international regime and machinery governing the use of the seabed beyond the limits of national jurisdiction; the Second Committee, embracing all the traditional law of the sea topics including the territorial sea, economic zone, continental shelf, high seas, straits, archipelagos, and fishing; and the Third Committee, dealing with the problems of marine pollution, conservation, scientific research, and technology transfer. The Session was more a forum for bringing together the various policy statements than a negotiating session, and little more was achieved at Caracas than the preparation by the Second Committee of a document titled Working Paper of the Second Committee: Main Trends[4] a rather unwieldy 127-page collection of alternative formulations which — consonant with the general tenor of the Session — was more a compendium of the various stated positions than a negotiating text.

The Third (second substantive) Session was held in Geneva the following year from March 26 to May 10, 1975.[5] This was in fact the first true negotiating session of the Conference, though no treaty or treaties were adopted. Instead, the principal result was the preparation — near the end of the Session — of a 3-part document titled Informal Single Negotiating Text.[6] At the suggestion of the President (and approved by the Conference), the Chairman of each Main Committee had been instructed to prepare a negotiating text taking into account the formal and informal discussions held in his Committee. This text was to be informal in character and would not prejudice the position of any delegation nor would it represent any negotiated text.[7] The final product, distributed on the last day of the Session, was accompanied by a "note by the President of the Conference" indicating that the text "will serve as a procedural device and only provide a basis for negotiation."

The Negotiating Text, while a complex document with 304 provisions and annexes in the form of draft treaty articles, is a far superior working paper than the "Main Trends" document produced at Caracas. Less a reflection of any one group's point of view, it represents as near a consensus on the various issues as was possible at Geneva. Though just a working paper, it is an assessment of majority views organized within a workable structure of written texts in the form of drafts around which negotiations could more conveniently be centered. The text presented by Committee I was in the form of a draft "Convention on the Seabed and the Ocean Floor and the Subsoil Thereof Beyond the Limits of National Jurisdiction." That submitted by Committee II contained 137 articles dealing with 11 topics: the territorial sea and contiguous zone, straits used for international navigation, the exclusive economic zone, the continental shelf, the high seas, land-locked states, archipelagos, the regime of islands, enclosed and semi-enclosed seas, territories under foreign occupation or colonial domination, and the settlement of disputes. The text submitted by Committee III was divided into three main parts: the protection and preservation of the marine environment, marine scientific research, and the development and transfer of technology.

It was this combined text that provided the framework for the Fourth (third substantive) Session held in New York a year later from March 15 to May 7, 1976. At the opening meeting, at the suggestion of the Conference President, it was agreed that each of the three Main Committees would utilize the respective part of the Informal Single Negotiating Text as a basis for informal negotiations, and the Chairmen of each Committee would then prepare a revision of the Negotiating Text "on the basis of amendments... (commanding) a wide measure of support."[8] After the eight-week Negotiating Session a Revised Single Negotiating Text[9] was distributed by the three Committee Chairmen on the last day of the Conference "as a basis for continued negotiation."[10] It was agreed that an additional session would be held three months later in New York along similar procedural lines.[11]

The Fifth (fourth substantive) Session was held from August 2 to September 17, 1976. As had been agreed at the Spring Session, informal negotiations were held on the basis of the Revised Text. The eight-week session, however, reached an impasse, primarily on the issues of the exploitation of the seabed, the legal status of the 200-mile exclusive economic zone, and the rights of land-locked and geographically disadvantaged states. Since negotiations have been conducted on the assumption that results will be a "package deal," progress on other issues was blocked as many states preferred not to commit themselves until these critical issues have been resolved.[12] The Session closed with no further revisions of the Revised Text.

The Sixth (fifth substantive) Session was held in New York from May 15 to July 15, 1977 with talks centering primarily on the issue of exploitation of the seabed. The Session ended with no more conclusive results than an agreement to reconvene in Geneva in April of 1978.[13] However, the Conference President, Shirley Amerasinghe, drafted a composite text for a treaty which was released shortly after the end of the Sixth Session, and which will serve as the basis for negotiation at the 1978 Geneva Session.

The Informal Composite Negotiating Text[14] combines the work of the three Main Committees into one negotiating text. The document is structured on the basis of 16 parts with 7 annexes, and the 303 articles are numbered consecutively.

The Composite Text, being the result of the Session devoted essentially to the issue of the exploitation of the seabed, differs from the

1976 revised single negotiating text primarily with regard to these provisions. The sections relevant to the territorial sea and passage through straits remain virtually unchanged. Though, like the previous negotiating texts, the Composite Text will only serve as a basis for the continuing negotiations, it is also evidence of a nearing consensus on most of the various issues, and there is reason to believe that the eventual overall treaty — particularly as regards the regime of the territorial sea and passage through straits — will not differ markedly.

B. STRAITS: THE MAJOR CLEAVAGES

Given the effect on international straits of a general extension of territorial seas to 12 miles, it is not surprising that the question of passage through these waterways has produced, during the course of the Conference, widely divergent positions. The one extreme is the position originally taken by the United States[15] (and supported by the USSR[16]) advocating a free transit right through straits similar to the right of passage through high seas. The other extreme, taken by a number of strait states,[17] argues that straits should be subject to the same regime as the territorial sea, with no right of "free" or "unimpeded" passage, but simply the traditional rule of "innocent passage" enhanced by an increased coastal state discretion to regulate passage.

An intermediate position surfaced at the Geneva Session in 1975 as a result of efforts by moderates from all regions to find a solution which was neither free (high seas) transit nor innocent passage with wide coastal state discretion.[18] This intermediate formula, incorporated into the Informal Single Negotiating Text[19] and maintained (with slight modifications) in the Revised Informal Single Negotiating Text,[20] and the Informal Composite Negotiating Text,[21] created a regime of "transit passage," a new term implying considerably more freedom to navigational interests than would be contemplated under "innocent passage," though not the total freedom possible in high seas transit. The transit passage provisions alone do not in fact reflect any formal consensus reached in Geneva or New York. Rather, they comprise a stance now being staunchly supported by the United States, the Soviet Union, the United Kingdom, and to a lesser extent the other developed countries with substantial merchant fleets or navies. It appears, however, that the "Group of 77," a loose alliance of developing countries — including most strait states — now numbering some 104 nations, though originally resisting this proposal, is now willing to accept this new regime in exchange for concessions from the developed world on other issues.[22] Whether the "transit passage" formula has nevertheless struck a minimal satisfactory balance between the interests of commercial and military navigation on the one hand and the interests of strait states in safeguarding their security and resources on the other, will depend on the final outcome of the Conference and — assuming the acceptance of the present proposal — on an examination of the "transit passage" regime and other issues bearing on passage through straits. It is to this examination that we now turn.

C. THE COMPOSITE NEGOTIATING TEXT AND PASSAGE THROUGH STRAITS

1. Transit Passage

Under the 1958 Convention, passage through international straits differs from passage through areas of the territorial sea not constituting international straits only in that innocent passage through the former cannot be suspended.[23] The Composite Negotiating Text goes a considerable step further in providing for a *sui generis* regime of "transit passage"[24] that would apply only to straits "used for international navigation between one area of the high seas or an exclusive economic zone[25] and another area of the high seas or an exclusive economic zone" (art. 37).[26] While the criterion of internationality — "used for international navigation"[27] — specified both in the Corfu Channel decision and the 1958 Convention has been retained, the area of applicability has been adjusted to include straits joining an area of high seas or economic zone with another area of high seas or economic zone.[28] However, transit passage would not apply if the strait is formed by an island of the strait state and its mainland "if a high seas route or a route in an exclusive economic zone of similar convenience[29] with respect to navigational and hydrographical characteristics exists seaward of the island" (art. 38.1, emphasis added). In such cases, a non-suspendable right of innocent passage would apply (art. 45).[30]

Transit passage is defined as "the exercise... of the freedom of navigation and overflight[31] solely for the purpose of continuous and expeditious transit of the strait" (art. 38.2) and constitutes a "right" which is not to be impeded (art. 38.1), hampered or suspended (art. 44). The requirement of continuous and expeditious transit, however, does not preclude passage through the strait for the purpose of entering, leaving or returning from a strait state (art. 38.2). Article 39 requires ships and aircraft in transit passage to "proceed without delay," "refrain from any threat or use of force against the sovereignty, territorial integrity or political independence" of the strait state, and to "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress." Ships in transit are required to comply with international safety and pollution regulations, and aircraft in transit are required to observe international aviation regulations and operate with due regard for the safety of navigation. Article 41 permits the strait state to designate and substitute sea lanes and traffic separation schemes "conforming to generally accepted international regulations" and adopted by "the competent international organization." These are to be respected by ships in transit.[32]

While both the transit passage and innocent passage regimes call for the "continuous and expeditious" transit of vessels, transit passage differs from innocent passage essentially as relates to coastal state control over the respective areas. Under the innocent passage regime the coastal state retains the right to prevent a passage which is non-innocent according to 12 specified criteria and can also suspend innocent passage for (undefined) reasons of security. Under the transit passage regime, however, vessels are not subject to any criterion of innocence — either general or specified — and passage cannot be suspended for reasons of security.

Perhaps the most controversial provisions are those relating to the regulatory competence of the strait state. Article 42 permits the state to make laws and regulations governing transit passage relating to the safety of navigation and regulation of marine traffic; the prevention, reduction, and control of pollution (though only by "giving effect to applicable international regulations" in that regard); prevention of fishing; and "the taking on board or putting overboard of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary regulations" of the strait state. These, however, are not to discriminate "in form or in fact" amongst foreign ships, "nor in their application have the practical effect of denying, hampering or impairing the right of transit passage." An important provision of the same article states that loss or damage incurred by the strait state through acts of ships or aircraft entitled to sovereign immunity and acting contrary to the provisions of that article shall entail the responsibility of the flag state for such loss or damage.[33]

Despite the authority given the strait state to enact regulations, create sea lanes, and the requirement of continuous and expeditious transit, the transit passage regime would appear to weigh heavily in favour of navigational interests. By placing navigation within a regime independent of the innocent passage provisions, maritime states are spared the subjective and vague test of innocence (peace, good order or security of the coastal state) prescribed in the 1958 Convention[34] which, given the creation of some 120 important international straits by virtue of the extension of territorial seas to 12 miles, would have placed their interests in jeopardy. However, given the hazards — particularly the danger of pollution — posed by the traffic of vessels within a confined area, little appears to have been given the strait state to protect its own interests as compared to that given other jurisdictional areas. The transit passage provisions provide for no actual enforcement measures by the strait state to punish — or effectively prevent — violations of its "laws and regulations" enacted under article 42. Article 234 of Part XII relating to the Protection and Preservation of the Marine Environment allows the strait state, in the case of vessels violating its laws and "causing or threatening major damage to the marine environment of the straits," to "take appropriate enforcement measures,". When considering the fact that 70 to 80 percent of oil from tankers is the result of routine discharges in normal tanker operations[35] which from a single vessel can hardly be considered as "major," this provision is clearly inadequate for dealing with this primary source of pollution. This is to be compared, for example, with the specific measures allowed the coastal state "to ensure compliance" with laws and regulations relating to its economic zone, which include "boarding, inspection, arrest, and judicial proceedings" (art. 73.1).[36] In areas of the territorial sea not constituting international straits the coastal state is empowered to undertake physical inspection and "cause proceedings, including arrest of the vessel" where a vessel has violated its laws and regulations relating to prevention, reduction and control of pollution (art. 221.2 of Part XII). Also, within areas of the territorial sea not constituting international straits, the coastal state is empowered to "take the necessary steps" to prevent non-innocent passage, and may suspend innocent passage for security reasons (arts. 25.1, 2). Within transit passage straits, however, suspension of the right is not permitted for any reason (art. 44), and the application of its laws cannot have the effect of "denying, hampering, or impairing" this right (art. 42.2). In areas of the territorial sea not subject to transit passage, the coastal state may enact its own legislation regarding prevention, reduction, and control of pollution (art. 21.1.f). In areas subject to transit passage, however, the most the strait state can do in this regard is apply existing international regulations (art.42.1.b). The new regime also provides for a newly-created right of overflight[37] for civil and military aircraft (art. 38.2). Submarines would presumably be allowed to transit the strait submerged, since the requirement of surface navigation and display is one relating to innocent passage (art. 20) which does not apply in transit passage straits, though it can be argued that the right of the strait state to regulate the safety of navigation (under art. 42) could preclude such passage. While the strait state under the 1958 Convention could not suspend innocent passage (art. 16.4) it could, of course, suspend a non-innocent passage (i.e., one prejudicial to the peace, good order or security of the coastal state), a recourse no longer available to the strait state in transit passage straits. Though this measure clearly left too much to coastal state discretion, the transit passage regime may not go far enough in providing strait states a minimum measure of protection. While it can be argued that a broad interpretation of the regulatory powers of the coastal state, buttressed by the inherent right of a state to take measures to preserve its vital national interests, is a recourse always available to it, a reliance on any such remedies - particularly with regard to an issue as vital and as salient as is this one - defeats from the outset the intent of the codification effort and the success of any future treaty. Hence, it is submitted that there is room for increasing the regulatory powers of the strait state, particularly as regards control of pollution in order to maintain a minimum satisfactory balance between the need for unimpeded navigation without arbitrary coastal state interference and the need to protect vital coastal interests. These will be proposed - together with those relating to other regimes - in the concluding section of this part.

2. Non-Suspendable Innocent Passage

Under the 1958 Convention, the regime most protective of navigation through international straits is that of a non-suspendable right of innocent passage through these waterways provided by article 16.4, that Convention's only straits article. With the creation of the far broader transit passage regime under the Composite Negotiating Text, non-suspendable innocent passage would now apply to the two categories of international straits not included under the transit passage provisions (art. 45) :

a) Those formed by an island of a strait state and its mainland when a high seas route in an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island.

b) Those situated between one area of the high seas or an exclusive economic zone and the territorial sea of a foreign state.

Article 45.2 states "there shall be no suspension of innocent passage through such straits" (emphasis added). As is also the case under the 1958 Convention[38] non-suspendable innocent passage is not a guarantee of free transit, since the strait state still retains the right to prohibit any passage which is non-innocent. This, of course, begs the question as to why a strait state would wish to suspend an innocent passage in the first place. Put in another way, what threats or acts would cause a strait state to suspend innocent passage which could not be considered as non-innocent under article 19 (i.e., prejudicial to its peace, good order or security)?[39] Barring specification of what such threats or acts would be, it would appear illusory to expect a strait state to consider any threat or act as innocent, thus obliging itself to keep the strait open, when it can conveniently consider it as non-innocent under article 19. The article (45.2) prohibiting suspension of innocent passage in these straits is linked to the article (25.3) permitting such suspension in non-international strait areas of the territorial sea, which is examined below.

3. Suspendable Innocent Passage

As is the case with the 1958 Convention, the Composite Text contains no special provisions for straits not used for international navigation.

Consequently, these are governed by the general provisions guaranteeing a right of innocent passage through the territorial sea. Under these provisions, the coastal state would have a right to suspend innocent passage for security reasons (art. 25.3) since such straits would carry no special status beyond being ordinary territorial waters, and, as such, passage remains subject to the requirement of innocence. Article 25.3 reads:

> The coastal state may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published (emphasis added).

As is also the case in the 1958 Convention, however, the question remains as to why a passage threatening the security of a coastal state and meriting suspension of passage is nevertheless considered an innocent one by article 25.3[40] while article 19.1 considers a passage "prejudicial to the ... security of the coastal state" as non-innocent, the only difference being that in the first case the suspension must be temporary, without discrimination and after having been duly published. The wording of article 25.3 would appear to indicate that what is being suspended is all passage rights to all foreign vessels caused by some general security threat that such passages would pose, while article 18.2 is referring to the specific passage of "a foreign ship" (emphasis added). Moreover, in the former case, the suspension would clearly seem to be anticipatory or preventive in nature (an example would perhaps include the suspension of passage rights for all foreign warships while the coastal state is at war), while in the latter case non-innocence would appear to refer to actual acts in which a foreign ship engages while already within the territorial sea, as evidenced by the listing in article 19.2 of the 12 non-innocent activities. Neverthless, there would still appear to be no reason why the coastal state could not — under article 19.1 ("passage is innocent as long as it is not prejudicial to the peace, good order or security of the coastal state") — consider a passage as prejudicial and, therefore, non-innocent before a vessel actually enters the territorial sea,[41] particularly one posing a security threat. It would, of course, suit the coastal state to adopt this posture, since it could then — under article 19.1 — prevent passage through those international straits excluded from the transit passage regime[42] and, in addition, avoid the conditions for suspension imposed by article 25.3 (i.e., that the suspension be temporary, in specified areas, without discrimination, and after having been duly published).

While under the analogous provisions of the 1958 Convention there was a paucity of state conflict, the salient interests of maritime and coastal states combined with the adoption of a 12-mile territorial sea would appear to demand far greater specificity in the drafting of a new convention governing these issues.

4. Innocent Passage Under the Composite Negotiating Text

The Composite Negotiating Text defines innocent passage in terms identical with those of the 1958 Convention: that is, as passage which is "not prejudicial to the peace, good order or security of the coastal state" (art. 19.1). However, where the 1958 Convention relies primarily on the subjective interpretation of this criterion with no reference to acts that would be considered "prejudicial,"[43] an effort was made in the Composite Text to obtain both objectivity and specificity in the determination of what acts in fact constitute prejudice. Aimed primarily at preventing threats to the security and environment of the coastal state, article 19 enumerates a dozen such acts:

a) Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state, or in any manner in violation of the principles of international law embodied in the Charter of the United Nations;

b) Any exercise or practice with weapons of any kind;

c) Any act aimed at collecting information to the prejudice of the defence or security of the coastal state;

d) Any act of propaganda aimed at affecting the defence or security of the coastal state;

e) The launching, landing or taking on board of any aircraft;

f) The launching, landing or taking on board of any military device;

g) The embarking or disembarking of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary regulations of the coastal state;

h) Any act of wilful and serious pollution, contrary to the present convention;

i) Any fishing activities;

j) The carrying out of research or survey activities;

k) Any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal state;

l) Any other activity not having a direct bearing on passage.

While the 1958 Convention provides for the obligation of passing ships to "comply with laws and regulations enacted by the coastal state" and makes specific mention only of "laws and regulations relating to transport and navigation" (art. 17) and prevention of fishing (art. 14.5), the Composite Negotiating Text goes further in specifying the type of regulations the coastal state may enact relating to innocent passage (art. 21). These include laws and regulations in respect of the safety of navigation and regulation of marine life; protection of navigational aids, cables, and pipelines; conservation of the living resources of the sea; prevention of infringement of fishing regulations; preservation of the environment and prevention, reduction and control of pollution; marine scientific research and hydrographic studies; and prevention of the infringement of customs, fiscal, immigration or sanitary regulations. The same article, however, goes on to state that these laws and regulations "shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted rules or standards."[44]

This would appear to place some restriction on the coastal state's efforts to prevent pollution in its territorial sea, a problem of special import in straits areas. Moreover, article 24.1 forbids the coastal state, in the application of its laws and regulations, from "imposing requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage." Part XII of the Composite Text dealing with Protection and Preservation of the Marine Environment,[45] however, would apparently allow the coastal state a somewhat wider latitude. Article 212.3 of that Part permits coastal states "in the exercise of their sovereignty within the territorial sea, (to) establish national laws and regulations for the prevention, reduction, and control of marine pollution from vessels," though these too must not "hamper (the) innocent passage of foreign vessels."

The stress on the maintenance and non-interruption of innocent passage on the part of the coastal state is so designed as to allow that state to deal with matters that are clearly of a non-innocent character. The Composite Text, however, in its article (19.2.h) defining innocent passage, would only consider an act of 'wilful and serious pollution" as non-innocent.[46] Thus, pollution caused by accident, negligence, poor standards of seamanship, poor vessel condition, or by any cause which is not intentional would ostensibly still be considered as innocent! Even were such an act to be deemed non-innocent, the manner of dealing with such situations is unclear. Article 25.1 refers solely to the fact that the coastal state may "take the necessary steps in its territorial sea to prevent passage which is not innocent" with no specification of what these steps can be. Article 221.2 of Part XII (dealing with the Protection and Preservation of the Marine Environment), however, in providing for the enforcement of coastal state regulations in the territorial sea, states:

> When there are clear grounds for believing that a vessel navigating in the territorial sea of a state has, during its passage therein, violated national laws and regulations established in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels, that state, without prejudice to... the relevant provisions... (regarding innocent passage) may undertake physical inspection of the vessel relating to the violation and may, when warranted by the evidence of the case, cause proceedings, including arrest of the vessel, to be taken in accordance with its laws....[47]

The combined provisions of Parts II and XII of the Composite Text present a paradoxical situation. Assuming the case of a serious accidental oil spill resulting from non-compliance by a passing vessel with the coastal state's pollution legislation, Part XII of the Text would permit arrest of the vessel (art. 221.3) for an act which Part II of the Text would consider essentially as innocent, since it does not involve a "wilful" act of pollution (art. 19.2.h). It is also apparent that the act of non-compliance itself cannot be viewed as non-innocent,[48] since non-compliance is not included among the dozen non-innocent activities listed in article 19. Rather, at the end of the article (21) listing the various laws and regulations the coastal state may enact, paragraph 4 merely obliges foreign vessels "exercising the right of innocent passage" to "comply with all such laws and regulations." Hence, it appears evident that innocence is dependent wholly on the criterion of what is not prejudicial to the peace, good order or security of the coastal state and on the acts specifically listed as prejudicial. Should the infringement of a law or regulation *result* in such prejudice the passage would be non-innocent, but the actual *act* of non-compliance is not *per se* a non-innocent action.[49]

McDougal and Burke, in referring to the analogous article (17) in the 1958 Convention, maintain that though this provision does not explicitly state that the coastal state may enforce its laws in the territorial sea, "there appears to be no doubt that this was one of its objects."[50] However, if under the Composite Text (and the 1958 Convention) the *act* of non-compliance itself is in essence an "innocent" one, in what effective manner could the coastal state *enforce* its laws if the application of these cannot "impose requirements... which have the practical effect of denying or impairing the right of innocent passage" (art. 24.1.a) and if innocent passage can only be suspended for reasons of security (art. 25.3)?[51]

Under the Composite Text, such enforcement could be carried out only if the act of non-compliance results in prejudice to the peace, good order or security of the coastal state or if it involves one of the 12 activities specifically regarded as predudicial by article 19.2. However, the listing of these activities, while on the one hand providing specificity upon which the coastal state can clearly act, also would appear to limit considerably the right of the coastal state to subjectively determine what is "prejudicial" beyond those 12 activities. That is, if the act of non-compliance does not in fact infringe one of the 12 prohibitions, there would appear to be little leeway for the coastal state to then subjectively consider the act as prejudicial to its peace, good order or security.

Relating specifically to non-compliance with anti-pollution regulations, article 221.2[52] of Part XII of the Composite Text dealing with Protection and Preservation of the Marine Environment would, of course, provide the coastal state with specific measures to deal with that specific infringement. Nevertheless, this article, permitting arrest of the vessel for non-compliance with anti-pollution laws, but "without prejudice to the right of innocent passage," and thus still considering that punishable act as "innocent," would appear to be an incongruous and less than adequate formulation.

In this regard, it is interesting to note that the Geneva Negotiating Text in its section on innocent passage contained an article (23.1) holding ships liable for any damage caused the coastal state, including its environment, if such damage occurs as a result of non-compliance with the coastal state's laws and regulations while in innocent passage. This provision was not included in either the Revised Negotiating Text or the Composite Negotiating Text.[53]

5. Transit Passage v. Innocent Passage

Having examined separately the regimes of transit passage and innocent passage, and having argued that the former does not go far enough in protecting the minimum recource and security interests of strait states, especially as compared to the latter, it becomes useful at this point to compare both regimes by bringing together the various provisions that have been discussed in each section.

Innocent passage is referred to as a "right", and passage proper is defined as "navigation through the territorial sea" for traversing those waters or for proceeding to or from internal waters or calling at a roadstead or port. Passage is to be "continuous and expeditious" except when stopping or anchoring are made necessary by force majeure or distress. Passage is considered innocent so long as it is not "prejudicial to the peace, good order or security of the coastal state," such prejudice arising if a foreign vessel engages in any of 12 different activities. The coastal state is empowered to prevent passage which is not innocent.

Transit passage is also referred to as a "right", and is defined as the "freedom of navigation and overflight solely for the purpose of continuous and expeditious transit" through "straits which are used for international navigation between one area of the high seas or an exclusive economic zone," though the requirement of continuous and expeditious transit does not preclude passage for purposes of going to or from a strait state. Vessels are to proceed without delay and "refrain from any activities" unless made necessary by force majeure or distress.

The virtual high seas nature of transit passage is evidenced by the newly-created right of overflight, and where submarines in innocent passage must navigate on the surface, no such requirement is specified in the transit passage regime (though there is some question as to whether the authority of the strait state to regulate the safety of navigation could preclude such passage). Warships in innocent passage which do not comply with coastal state regulations concerning passage (and there is some question as to whether such regulations could include prior notice or permission) can be requested to leave the territorial sea. The transit passage provisions, however, contain no such warning to military vessels.

The difference between the two regimes is even more evident with respect to the extent of control by the coastal state over passing vessels. While vessels in innocent passage are subject to 12 criteria of innocence, those engaged in transit passage are subject to no such conditions. If essential to the protection of its security, coastal states can temporarily suspend innocent passage. Strait states, however, are specifically prohibited from carrying out any suspension of transit passage. The coastal state in innocent passage areas can make regulations covering 8 subject areas and can make its own laws regarding control of pollution, whereas in transit passage areas, the strait state can make regulations covering only 4 subject areas and, regarding anti-pollution measures, only by "giving effect to applicable international regulations". Where a vessel in innocent passage can be subject to inspection and arrest for violating anti-pollution regulations regardless of the extent of damage, the vessel in transit passage is subject to "appropriate enforcement measures"(undefined) only if the violation of the anti-pollution regulations causes or threatens "major damage".

6. Sea Lanes and Traffic Separation Schemes

The Composite Text provides for the designation of sea lanes and traffic separation schemes by the coastal state in its territorial sea. Since passage rights in these sea lanes vary in accordance with their location, it is convenient to examine the respective provisions separately:

i) Sea lanes designated through straits used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or exclusive economic zone would be subject to transit passage rights (arts. 37, 41) as long as the strait is not formed by an island of the strait state where a high seas or exclusive economic zone route exists seaward of the island (art. 38.1). These sea lanes must be approved by the competent international organization (art. 41.4).

ii) Should the international strait through which the sea lane lies be formed by an island of the strait state where a high seas or economic zone exists seaward of the island, non-suspendable innocent passage would apply (art. 45).

iii) Should the international strait through which the sea lane lies be one joining an area of the high seas or economic zone with the territorial sea of a foreign state, non-suspendable innocent passage would apply (art. 45).

. Since these last two cases are excluded from the transit passage provisions and — according to article 45 — are to be governed by the general innocent passage provisions of Section 3 of Part II (save the fact that passage through these straits cannot be suspended), the strait state need only "take into account... the recommendations of competent international organizations" in designating these sea lanes (art. 22.3.a).

iv) In the case of straits not used for international navigation, which are governed by the general suspendable innocent passage provisions, it would seem inconsistent for the strait state to designate a traffic separation scheme in the absence of such international use. Such a strait, however, could still require the designation of sea lanes for safe navigation, regardless of the volume of traffic. In these cases, the strait state also need only "take into account... the recommendations of competent international organizations" in designating these lanes (art. 22.3.a).

v) The section on innocent passage through the territorial sea (3 of Part II) provides for the designation by the coastal state of sea lanes through "channels customarily used for international navigation" (art. 22.3.b). Precisely what body of water this article is referring to is unclear. In using the word "channel" instead of "strait," is article 22 in fact referring to non-strait routes through territorial waters? If so, "channel" is an inappropriate term, since it is used by geographers and common usage to refer either to straits or to rather wide straits areas, but always to comparatively narrow passages between shallows connecting two larger bodies of water.[54] It is significant that the term "channel" also appears in the Part (IV) on archipelagos. In the article (53) dealing with archipelagic sea lanes passage[55] the term "strait" is not used at all (presumably since the waters in question are "archipelagic waters" rather than territorial waters[56]). Instead, the designation by the archipelagic state of sea lanes for passage "between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone" must include "all normal passage routes used as routes for international navigation," and "within such routes... all normal navigation channels" (emphasis added). On the basis of this description, it would seem evident that the term "channel" is being used to refer to straits areas within archipelagic waters. Moreover, the archipelagic sea lanes passage regime is virtually identical to the transit passage regime of international straits, and article 54 applies key articles of this straits regime *mutatis mutandis* to archipelagic sea lanes passage. Assuming a channel to be essentially a straits area, are the article 22 "channels" intended to be those straits excluded from the transit passage regime by article 45 and placed under the general innocent passage provisions? If this is the case, why does article 22 use the designation "channels customarily used for international navigation" rather than the designation "straits used for international navigation" as stated in article 45? An argument could be made for a significant difference between a strait "customarily used" and one merely "used".[57]

Is the article referring to narrow passages joining two territorial seas? A strait in the legal sense must, at some point, be overlapped by territorial waters and, at either one or both ends, connect to a body of water larger than the sum of both territorial seas.[58] That is, a waterway joining two areas of water no larger than the combined territorial seas has no special legal status beyond being ordinary territorial waters. If the Composite Text is referring to such a waterway as a "channel," this would consist, under a 12-mile rule, of a passage with a maximum breadth of 24 miles joining two areas of water each with a maximum breadth of 24 miles, a configuration that would occur only in archipelagos, whose waters — under the Composite Text — would no longer be territorial, but rather, "archipelagic."

The difficulty, of course, lies in the lack of a precise legal and linguistic difference between a "channel" and a "strait," Barring any clarification of the precise nature of the waterway to which article 22 refers, what is to prevent a coastal state from designating a sea lane under the provisions of that article through an international strait within its territorial sea, thus only taking into consideration the recommendations of a competent international organization and subjecting foreign vessels to suspendable innocent passage rather than to the broader non-suspendable transit passage regime?

7. Warships

On the basis of the Composite Text it is unclear to what extent transit passage and innocent passage rights apply equally to merchant vessels and warships. The section (2 of Part II) on transit passage makes no specific mention of warships, though the broad scope of the transit passage regime and the consistent reference to "ships" would presumably include vessels of every character. Only an indirect reference is made in article 42.5 where the flag state is held liable for loss or damage to the strait state caused by failure on the part of "a ship or aircraft entitled to sovereign immunity" to comply with the strait state's laws and regulations while in transit passage.[59]

The provisions relating to innocent passage appear — as in the 1958 Convention — under the heading of subsection A entitled "Rules Applicable to All Ships." Within this subsection all vessels are referred to as "ships," with no distinction as to their character. Subsection C however, is titled "Rules Applicable to Warships and Other Government Ships Operated for Non-Commercial Purposes." Under this heading, article 30, in terms similar to article 42.5 of the transit passage section, also holds the flag state liable for loss or damage to the coastal state resulting from non-compliance by a "warship or other government ship operated for non-commercial purposes" with the coastal state's regulations concerning passage through the territorial sea. The reason for the omission of the specific word "warship" in the analogous transit passage article remains unclear. It is also interesting to note that in the Geneva Negotiating Text article 29.2 specifically states that "the rules contained in subsection A (entitled "Innocent Passage in the Territorial Sea: Rules Applicable to All Ships") shall apply to warships." This was omitted from the Composite Negotiating Text.

Article 30 of the Composite Text states in terms virtually identical to those of the 1958 Convention that warships not complying with the laws and regulations of the coastal state concerning passage through the territorial sea and disregarding requests for compliance may be required "to leave the territorial sea immediately." As is the case with the 1958 Convention, and assuming that the "Rules Applicable to All Ships" regarding innocent passage do apply to warships, the question remains: what limits does article 30 place on their right to passage? Could the "laws and regulations" the warship must comply with under that article include the requirement of prior permission or prior notification?[60] Worse yet, would the power to regulate also inherently include the power to exclude? While restrictions on passage of warships has in fact not been the practice of states under the 1958 Convention, the intensification of interests on the part of maritime and coastal states likely to emerge with the adoption of a 12-mile territorial sea and the consequent creation of over 120 new territorial straits would indicate the need for more precise provisions in this regard. A mere restatement of the vague provisions of the 1958 Convention is hardly satisfactory.[61]

8. Passage Through Archipelagos

Both the Geneva Negotiating Text and the Composite Negotiating Text reflect the pressure brought to bear by certain island nations — particularly the Philippines, Indonesia, Fiji, and Mauritius[62] — to claim sovereignty over the waters enclosed by their islands to form an entity described as an "archipelagic state." This configuration is defined by the Composite Negotiating Text (art. 46) as "a state constituted wholly by one or more archipelagos" which may include other islands, an "archipelago" meaning "a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters, and other natural features form an intrinsic geographical, economic, and political entity, or which historically have been regarded as such." The method of drawing the baselines for this configuration and the precise status of the waters to be enclosed engendered considerable debate at the Conference since large areas of high seas would become subject to the control of the archipelagic state. Indonesia's claim, for example, based on a straight baseline system connecting the outermost islands in the archipelago, encompasses an additional 98,000 square nautical miles, an area enclosing some 3 1/2 times the amount of sea enclosed without using the straight baseline system.[63] Since some of the world's most important straits lie within archipelagos, the legal status of these waters will have a large bearing on maritime communication.[64] While archipelagic states favored categorizing these as internal waters (and consequently not subject to innocent passage), and maritime states favored a maximum of navigational rights, the negotiating texts provide for a compromise designation. According to article 49 of the Composite Text, the waters enclosed within the baselines drawn around the island group[65] are to be known as "archipelagic waters," from which the territorial sea, contiguous zone, economic zone, and continental shelf will be measured (art. 48) and over which the archipelagic state is sovereign (art. 49). This sovereignty, however, is limited by the "right of archipelagic sea lanes passage," a new *sui generis* regime analogous to the transit passage regime of the territorial sea, and defined by article 53.3 as

> the exercise in accordance with the present convention of the rights of navigation and overflight in the normal mode for the pur-

> pose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

In this respect the archipelagic state "may" (not "will") designate sea lanes and air routes for the safe, continuous, and expeditious passage of foreign ships and aircraft (art. 53). These sea lanes and air routes are to traverse the archipelago and include all "normal passage routes used as routes for international navigation or overflight through the archipelago" and "all normal navigational channels" (art. 53.4). Should the archipelagic state not designate these sea lanes, foreign vessels would have the right to exercise the right of archipelagic sea lanes passage "through the routes normally used for international navigation" (art. 53.12). The provisions regarding duties of ships and aircraft during their passage, duties of the archipelagic state, and those defining the laws and regulations permitted to be enacted by the archipelagic state to govern archipelagic sea lanes passage are identical to those governing transit passage (art. 54). It is interesting to note that, though applying to strait areas, the article dealing with archipelagic sea lanes passage does not utilize the term "straits," presumably since the waters in question are not territorial waters, but "archipelagic waters."

Like transit passage, then, archipelagic sea lanes passage is virtually an unimpeded right of transit, including rights of overflight. Like the transit passage regime, there is some presumption in favour of a right of submerged transit for submarines, since the requirement of surface navigation is one inherent to innocent passage, which does not apply in archipelagic sea lanes. Unlike the definition of transit passage, however, archipelagic sea lanes passage is defined as a right of navigation and overflight "in the normal mode," a phrase that could well be interpreted as allowing only surface navigation. Moreover, like the transit passage regime, the right to regulate the safety of navigation may also serve to preclude submerged transit. As is also the case with transit passage, archipelagic sea lanes passage applies only to passage between one part of the high seas or economic zone and another part of the high seas or economic zone. In archipelagic waters outside sea lanes or through routes not "normally used for international navigation" there would be a suspendable right of innocent passage identical to that governing passage through the territorial sea (art. 52). An apparent lacuna presents itself here. Since article 52 would place all parts of archipelagic waters not subject to archipelagic sea lanes passage (including those *not* joining one part of the high seas or economic zone with another part of the high seas or economic zone) under the innocent passage provisions governing passage through the territorial sea (Sect.3 of Part II) which can be suspended for security reasons, this would appear to ignore the special *non-suspendable* right of innocent passage provided for in Section 3 of Part III and applicable to straits used for international navigation between one part of the high seas or economic zone and the *territorial sea* of a foreign state. By not providing for the contrary, these straits or routes, within archipelagos, would presumably be subject to a *suspendable* right of innocent passage. Why these straits or routes within archipelagos would be subject to *suspendable* innocent passage and within non-archipelagic territorial waters to *non-suspendable* innocent passage is unclear.

A further ambiguity is apparent. Article 53.3 limits the right of archipelagic sea lanes passage only to those areas joining one part of the high seas or economic zone with another part of the high seas or economic zone. On the other hand, article 53.12 states that should the archipelagic state not designate sea lanes, foreign vessels would still have the right to archipelagic sea lanes passage through "routes normally used for international navigation," with no qualification as to the type of seas these routes would join. It would, of course, suit the archipelagic state to designate as few sea lanes as possible through its waters, since the areas not so designated would be subject to greater control by that state (suspendable innocent passage). It is prevented from adopting such a strategy, however, by the article (53.12) authorizing foreign vessels in such cases to exercise the broad archipelagic sea lanes passage through "routes normally used for international navigation."[66] This amounts to a check on any intentions on the part of the archipelagic state to subvert the principle of unimpeded transit through maritime highways traversing its waters. However, whether these "routes" contemplated in paragraph 12 must also join high seas areas or economic zones with other high seas areas or economic zones, or whether foreign vessels can exercise archipelagic sea lanes passage through any "route normally used for international navigation" is not clear.

The use of the word "normally" to some extent restricts the number of areas subject to this regime. It will be remembered that the International Law Commission recommended a similar qualification in its draft article on straits for consideration at the 1958 Conference. The Conference, however, in an effort to widen the category of straits to which non-suspendable innocent passage would apply, deleted the word "normally."[67] The criterion of internationality — "used for international navigation" - contained in the Revised Text and retained from the 1958 Convention, is itself a most ambiguous one.[68] The introduction of the word "normally" would appear only to compound the ambiguity, especially if these routes comprise straits, since it can be argued that a strait "normally" used for international navigation is one with considerably more traffic than one that is merely "used."

Another question is that of the status of coastal archipelagos belonging to continental states such as Canada. The Geneva Negotiating Text contains an article (131) stating that the provisions relating to archipelagic states "are without prejudice to the status of oceanic archipelagos forming an integral part of the territory of a continental state." This proviso was not included in the Composite Text. While the definition of an archipelagic state (identical in both negotiating texts) would appear to exclude such continental archipelagos, the precise scope - particularly with the deletion of article 131 - remains unclear. Would it, for example, include mid-ocean chains belonging to - though not part of - a continental state (e.g., Hawaii)?

9. Passage Through Straits Enclosing Non-Territorial Sea Areas : The Contiguous Zone and the Exclusive Economic Zone

Any sea channel in its entirety wider than the sum of the breadth of the two territorial seas is not - in a legal sense - regarded as a strait, and its non-territorial waters being high seas would not be subject to either transit passage or innocent passage. However, since some territorial straits enclose small sections of sea larger than the breadth of both territorial seas, the precise legal nature of the waters existing between the territorial sea and the high seas could have an important bearing on the extent of passage through these straits.

Such situations are, of course, exclusive of occasional instances where a strait state has claimed jurisdiction over these enclaves of non-territorial sea and incorporated them as part of its territorial sea. These will be dealt with in the following section (i).

Like the 1958 Convention, the Composite Text provides for an area contiguous to the territorial sea over which the coastal state "may exercise the control necessary to... prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea... (and) punish infringement of ... (these) regulations within its territory or territorial sea" (art. 33.1). Under the 1958 Convention this zone was in fact "a zone of the high seas" (art. 24.1) and could extend only up to 12 miles from the baselines from which the territorial sea is measured (art. 24.2). Hence, there was no question that within this zone, foreign vessels enjoyed a high seas right of navigation subject only to a limited power of control by the coastal state. Under the Composite Text, however, the contiguous zone is not defined as an area of the high seas, but simply as "a zone contiguous to its territorial sea" (art. 33.1). The high seas are in fact defined as all parts of the sea not included in the exclusive economic zone, territorial sea or internal waters (art. 86). Hence, unlike the 1958 Convention, the high seas per se no longer commence where the territorial seas end. Moreover, the contiguous zone is in fact overlapped by the economic zone, since the former cannot extend beyond 24 nautical miles from the baseline from which the territorial sea is measured (art. 33.2) while the latter is also "adjacent to... (the) territorial sea" (art. 55.1) and cannot extend beyond 200 nautical miles from the baseline from which the territorial sea is measured (art. 57). Hence, for a distance of 12 nautical miles beyond the territorial sea, both regimes would be applicable. Within the economic zone the coastal state has "sovereign rights" over living and non-living resources (art. 56.1.a), including jurisdiction with regard to the preservation of the marine environment (art. 56.1.b).

To this end, the enforcement of its laws and regulations can include the boarding, inspection, and arrest of passing vessels (art. 73.1). These measures, however, are to punish infractions occurring within the economic zone, and hence outside of the territorial sea. In the case of the contiguous zone, however, the coastal state can, within this zone, exercise "control" to "prevent" and "punish" infringements of its regulations occurring "within its territory or territorial sea," though relating only to its customs, fiscal, immigration, or sanitary regulations.

While the terms "control," "prevent infringement," and "punish" are not defined, either in the 1958 Convention or in the Composite Text, the wording is harsher than that used in the sections on innocent passage or transit passage in the territorial sea. Sir G. Fitzmaurice in referring to the 1958 Convention, and though holding a generally restrictive view of coastal state competence, concedes that "the control necessary to 'punish,' etc., must clearly include a power of arrest and conduct into port."[69]

With this in mind the precise scope of the four specific activities over which the coastal state has control in the contiguous zone takes on added significance. It would appear for example, that a broad interpretation of "sanitary regulations" could embrace more than matters relating strictly to the preservation of health. Since pollution of a coastal state's waters can present a clear danger to the health of the coastal state's peoples, it can be argued that these "sanitary regulations," the violations of which the coastal state can punish in the contiguous zone, can also include those relating to control of pollution.[70] Hence, from the foregoing it would appear that a vessel polluting territorial waters while transiting a strait can be subject to such punishment upon entering a contiguous zone either within the strait or upon exiting, though it is no longer in the exercise of innocent passage or transit passage, and has ceased polluting.

As stated earlier, the contiguous zone under the 1958 Convention was clearly defined as an area of high seas. The Commentary accompanying the draft article (66) of the International Law Commission (the substance of which was adopted as article 24) stated:

> These waters are and remain a part of the high seas and are not subject to the sovereignty of the coastal state which can exercise over them only such rights as are conferred on it by the present draft or are derived from international treaties.[71]

In fact, it was the acceptance of a narrow 3-mile territorial sea that led to the need for a contiguous zone. While it was felt at the time that a 3-mile territorial belt was adequate as an area over which the state had full sovereign rights, it was inadequate for the protection of certain specific and vital interests such as health and revenue. Hence, the contiguous zone was predicated upon the existence of a narrow territorial sea.[72] Moreover, within the territorial sea itself, the 1958 Convention only authorized the enactment of laws and regulations relating specifically to the prevention of fishing (art. 14.5) and to the regulation of transport and navigation (art. 17). Under the Composite Text, however, the coastal state is specifically authorized to enact laws and regulations within a 12-mile territorial sea relating to

8 activities, including the prevention of infringement of customs, fiscal, immigration, and sanitary regulations, though ironically without the specified enforcement powers provided for in the contiguous zone provisions. What then is the precise legal status of the contiguous zone under the Composite Text? Article 86 defines the high seas as all parts of the sea that are not included in the exclusive economic zone, territorial sea, internal waters or archipelagic waters. Since the contiguous zone is not specifically exempted from this high seas definition, but at the same time overlaps the economic zone, does this mean that it is at once a high seas area for the purposes of prevention and punishment of infringements to its customs, fiscal, immigration and sanitary regulations (as is the case under the 1958 Convention) and an economic zone area for purposes of conservation of living and non-living resources? Or is it an area sui generis? The latter would appear to be the case. With the extension of the territorial sea to 12 miles, and considering the fact that the new economic zone provisions do not give the coastal state jurisdiction over customs, fiscal or immigration matters within that zone, the contiguous zone has been retained by merely shifting it seawards to accommodate an extended territorial sea. Thus, a belt adjacent to the territorial sea (for a maximum of 12 additional miles) and overlapped by the economic zone is still set aside for exercising control over those specific matters. While such an additional belt was justified when a narrow 3-mile territorial sea was the custom, its existence next to a 12-mile territorial sea would appear to be superfluous.

The concern here, of course, is with the effect of this area (or areas) on navigation through straits with non-territorial sea enclaves. While article 58 provides for the "freedom of navigation and overflight" in the economic zone, this area (as provided in article 86) is clearly not a high seas area, but a zone sui generis,[73] and the freedom of navigation there is "subject to the relevant provisions of the present Convention" (art. 58.1). It would be logical to assume that in areas seaward of the territorial sea, vessels would enjoy a greater freedom of passage than would exist in territorial waters. However, since the coastal state within the contiguous zone can "punish" infringements committed in the territorial sea presumably by arrest or conduct into port, and since vessels passing within the contiguous zone while either entering, exiting, or transiting a strait are technically not in exercise of either innocent passage, transit passage, or high seas passage, the precise nature of their transit rights — vis-a-vis coastal enforcement rights — remains vague. Hence, it is submitted that a 12-mile zone beyond the territorial sea with an undetermined legal status within which the coastal state has enforcement powers at least as stringent as those applicable in the territorial sea (though only in a limited and specified number of areas) and which is overlapped by the new economic zone, would appear to add a confusing and unnecessary dimension to the new law of the sea and, in particular, to navigational rights.

10. Extension of Coastal State Jurisdiction in Straits Wider Than — or Enclosing Sections Wider Than — the Breadth of Both Territorial Seas

With the general extension of territorial seas to 12 miles and of the contiguous zone to 12 additional miles beyond that, a large number of straits, which previously — under the 3-mile rule — had high seas corridors running through the entire strait or which contained high seas pockets, will consist entirely of territorial waters. This extension, however, will also cause new non-territorial enclaves in some straits measuring 24 miles or less at their entrances, and entire stretches of non-territorial waters in those measuring more than 24 miles across. Under the traditional 3-mile rule there was no general agreement that a precise delimitation of the territorial sea was applicable in straits. Hence, some publicists maintained that a strait state could in fact claim jurisdiction over the entire waterway, including the stretch of free water,[74] particularly if the strait could be commanded by coastal batteries from one or both sides of the strait.[75] The United States and Canada, for example, have claimed territorial jurisdiction — based on historical rights and divided by the middle boundary line — over the entire Strait of Juan de Fuca, which has an average width of 15 miles.[76] During World War I, Chile claimed those parts of the Strait of Magellan more than 3 miles from its shore as part of its territorial sea for the defence of its neutrality.[77]

Under a 3-mile rule, in straits with breadths slightly wider than 6 miles or enclosing small high seas areas, it could be argued that there was some justification — from the point of view of security — for coastal claims embracing the entire strait. As stated earlier, it was precisely the formal acceptance in 1958 of the traditional narrow 3-mile limit that prompted the demand for a protective contiguous zone,[78] a concern perhaps even more justified in narrow straits areas. In fact, the draft articles on the regime of the territorial sea prepared by the International Law Commission in 1955 provided in article 12 that "an area of sea not more than two miles across" enclosed by a territorial sea could be declared by the coastal state to be part of its territorial sea.[79] At the 1958 Conference, however, this article was replaced by a provision forbidding states having adjacent coasts to extend their territorial seas beyond the median line between them, unless made necessary by historical title or "other special circumstances" (art. 12.1). The Revised Text contains an identical provision (art. 15).

With the general widening of territorial seas to 12 miles and even considering the increased threat of pollution in recent years, there would appear to be little legitimate justification for any further widening of the territorial sea within a strait, since both the contiguous zone and economic zone provisions would presumably allow the coastal state sufficient jurisdiction beyond the territorial sea to protect its resource interests.

REFERENCES TO CHAPTER IV

1. See *supra* Ch. 2, pp. 26-32.

2. Official records of the General Assembly, 26th Session, Supplement No. 21 (A/8421), rep. in 10 *International Legal Materials* (1971), p. 224.

3. For an account of the Caracas Session see J.R. Stevenson and B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: the 1974 Caracas Session," 69 *American Journal of International Law* (Jan., 1975), pp. 1-30.

4. Doc. A/CONF. 62/C.2/WP.1.

5. For an account of the Geneva Session see J.R. Stevenson and B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session," 69 *American Journal of International Law* (Oct., 1975), pp. 763-97.

6. Doc. A/CONF. 62/WP. 8/Parts I, II, III, May 7, 1975; reprinted in 14 *International Legal Materials* (1975), p. 682. Some months later the President of the Conference prepared and circulated Part IV of the Single Negotiating Text devoted to the Settlement of Disputes (Doc. Sd. Gp./2nd Session/No. 1/Rev. 5 of May 1, 1975; also reproduced in 14 *I.L.M.* (1975), p. 762.

7. See U.N. Doc. A/CONF. 62/SR. 54, April 18, 1975, p. 3.

8. *Official Records, Third United Nations Conference on the Law of the Sea (Fourth Session)*, Vol. V, p. 3.

9. Doc. A/CONF. 62/WP. 8/Rev. 1/Parts I, II, III, May 6, 1976, *Official Records*, Vol. V, p. 125.

10. *Ib*.

11. *Ib*., pp. 68, 71.

12. *The Globe and Mail*, Toronto, September 16, 1976, p. 4. See J.L. Charney, "Law of the Sea: Breaking the Deadlock," 55 *Foreign Affairs* (April, 1977), pp. 598-629. For an account of the *1976 New York Sessions* see B.H. Oxman, "The Third United Nations Conference On the Law of the Sea: The 1976 New York Sessions," 71 *American Journal of International Law* (April, 1977), pp. 247-69.

13. R.G. Darman, "The Law of the Sea," 56 *Foreign Affairs* (Jan., 1978), pp. 373-74.

14. U.N. Doc. A/CONF. 62/WP.10, July 15, 1977, rep. in 16 *International Legal Materials* (1977), p. 1108.

15. Sea-Bed Committee Report for 1971, Doc. A/AC. 138/SC. II/L.44.

16. See U.N. Doc. A/CONF. 62/C.2/L.11 for a proposal by Bulgaria and others (including the USSR) at the 1974 Caracas Session.

17. See draft article by Malaysia, Morocco, Oman, and Yemen at the Caracas Session, Doc. A/Conf. 62/C.2/L.16 (1974). See also the position of Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain, and Yemen in the Sea-Bed Committee, *Report for 1973*, Vol. III, Doc. A/AC. 138/SC. 11/L.18.

18. The foundation for this new regime is actually found in a proposal made by the United Kingdom at the earlier 1974 Caracas Session (Doc. A/CONF. 62/C.2/L.3). However, the "transit passage" rights envisaged in that draft proposal lean even more toward navigational interests than the "transit passage" regime appearing in the more recent negotiating texts.

19. Part II, arts. 34-44.

20. Part II, arts. 33-43.

21. Part III, arts. 34-44.

22. See J.T. Swing, 'Who Will Own the Oceans?", 54 *Foreign Affairs* (April, 1976), p. 534; J.L. Charney, *supra* note 12, at pp. 613-14.

23. See *supra*, pp. 76-82 for an examination of the 1958 Convention as it relates to passage through straits.

24. It is interesting to note that while the 1958 Convention discussed passage through international straits in only one paragraph (para. 4 of art. 16) and only as an exception to the general rule of innocent passage, the Composite Negotiating Text devotes an entire part (III) to international straits.

25. The economic zone is defined by the Composite Negotiating Text as an area "not extend(ing) beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured" over which the coastal state has exclusive sovereign rights over living and non-living natural resources (art. 56.1; art. 57). See *infra* section 8, pp. 116-121.

26. Straits joining an area of the high seas or economic zone with the *territorial sea* of a foreign state would be governed by a non-suspendable right of innocent passage (art. 45). See *infra* section 2, pp. 96-97.

27. See *supra*, pp. 77-79.

28. It will be remembered that the Court in the *Corfu Channel* case referred only to straits joining two parts of the high seas, *supra* Ch. 2, note 55 and accompanying text. The 1958 Convention broadened the category of straits to which innocent passage would apply by also including those located between one part of the high seas and the territorial sea of a foreign state, *supra* Ch. 2, note 66 and accompanying text.

29. It will be interesting to discover whether the introduction of a criterion of "convenience" will elicit the argument that the internationality of a strait can be determined by the convenience of that route.

30. See *infra* section 2, pp. 96-97.

31. The 1958 Convention contains no provision for overflight by aircraft, either in territorial straits or territorial waters not constituting straits. Neither has such a right been recognized by general international law, as the sovereignty of a state in the airspace over its territory is recognized as complete and exclusive. See I. Brownlie, *Principles of Public International Law*, 2nd. ed., (Oxford, 1973), p. 121. However, the 1944 Convention on International Civil Aviation provides for a right of overflight — as between the parties — of the territorial sea limited to civil aircraft not engaged in scheduled air transport and not including military aircraft, 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295, arts. 2, 3, 5, 7.

32. See *infra* section 5, p. 106.

33. The Geneva Negotiating Text in its section on innocent passage contained an article (23.1) holding merchant ships liable for any damage caused the coastal state or its environment as a result of non-compliance with the coastal states laws and regulations. This provision, however, was not included in the Composite Text.

34. See *supra*, pp.74-76.

35. R.J. Skocypec, "Tightening Controls on Operational Oil Pollution from Tankers," 5 *UCLA-Alaska Law Review*, spring, 1976, pp. 354-355. See *supra*, pp. 22-23.

36. See *infra*, p.102-16.On the enforcement measures provided for by the contiguous zone provisions see *infra*, section 8, p.

37. See *supra* note 31.

38. See *supra*, pp. 78-82.

39. See *infra*, p. 98.

40. It is submitted that since article 25.3 allows the state to suspend *innocent* passage for reasons of security, such a formulation logically indicates that the security threat is essentially an "*innocent*" one.

41. Referring to the analogous article (14.4) in the 1958 Convention, McDougal and Burke conclude that coastal state competence to prohibit passage is not restricted to incidents occurring *in* the territorial sea; rather, the coastal state can "take other factors into account, including, for example, the purpose of the projected passage, the cargo carried, and destination in a third state," *The Public Order of the Oceans* (New Haven and London, 1962), p. 258.

42. See *supra*, p. 96.

43. The 1958 Convention makes no specific reference as to what type of acts would be considered "prejudicial to the peace, good order or security of the coastal state." The only act mentioned specifically as non-innocent is that of foreign fishing vessels failing to observe the coastal state's laws and regulations preventing fishing in the territorial sea (art. 14.5). Other acts prohibited and presumably considered non-innocent are submarines failing to navigate on the surface and show their flag (art. 14.6), and stopping and anchoring during passage when these are not incidental to ordinary navigation or rendered necessary by force majeure or distress (art. 14.3).

44. This provision would presumably conflict with the Canadian Arctic Waters Pollution Prevention Act as it relates to Canada's jurisdiction over the 100-mile anti-pollution zone north of 60° north latitude. Section 12(1) of the Act would allow the Governor in Council to

> make regulations applicable to ships of any class or classes specified therein, prohibiting any ship of that class from navigating within any shipping safety control zone specfied therein a) unless the ship complies with standards prescribed by the regulations relating to (among others) hull and fuel tank construction, including the strength of materials used therein, the use of double hulls and the subdivision thereof into watertight compartments.

9 International Legal Materials (1970), p. 547.

45. This part of the Composite Text was originally drafted by the Third Committee of the Conference, a fact which would explain any inconsistencies between the various parts of the Text.

46. It is interesting to note that in the Geneva Negotiating Text the comparable article (16.2) mentions only "wilful pollution." This could indicate perhaps that the intention of the revision was to consider any serious pollution, whether wilful or not, as non-innocent. The revised wording, however, precludes such a meaning.

47. See also the stringent enforcement measures allowed the coastal state in its economic zone, supra note 142 and accompanying text. On the measures allowed in the contiguous zone, see infra, p.116.

48. This, e.g., is the view of G. Fitzmaurice with regard to the relevant provisions of the 1958 Convention, "Some Results of the Geneva Conference on the Law of the Sea," 8 International and Comparative Law Quarterly (1959), p. 95.

49. While the infringement of a regulation actually affecting innocence would amount to a non-innocent act, not all regulations in fact affect innocence. For example, article 21 allows the coastal state to make laws to reduce and control pollution, but according to

article 19, only a "wilful and serious" act of pollution can be considered as non-innocent. Hence, a violation of an anti-pollution regulation which does not result in "serious" pollution would not be a non-innocent act.

50. McDougal and Burke, *supra* note 41, at pp. 272-73.

51. While non-compliance could in some cases *result* in a security threat (e.g., violation of immigration or sanitary regulations), the violation for example of regulations relating to protection of navigational aids cannot automatically be considered as a threat to security.

52. *Supra* note 47 and accompanying text.

53. Though the Composite Text did retain a provision holding the flag state liable for damage caused by "a warship or other government ship" within the territorial sea (art. 31).

54. See e.g., *A Glossary of Geographical Terms* (London, 1966), p. 100; *Longmans Dictionary of Geography* (London, 1963), p. 83.

55. See *infra*, section 7, pp. 111-116.

56. Though "archipelagic waters" are those enclosed within the archipelago by application of the straight baseline system (art. 49.1) and *from which* the territorial sea, contiguous zone, and economic zone are measured (art. 48), foreign vessels enjoy a right of innocent passage through archipelagic waters (art. 52.1) identical to that enjoyed in the territorial sea. Within these waters, however, the archipelagic state may designate sea lanes through which foreign vessels enjoy a right of "archipelagic sea lanes passage" (arts. 53, 54), a regime virtually identical to the transit passage regime applicable to international straits.

57. It would be reasonable to maintain that a "customarily used" strait is one with significantly more traffic — and hence more important — than one that is merely "used." In fact, the final report of the International Law Commission to the U.N. General Assembly in 1956 recommended that there be no suspension of innocent passage through straits "*normally* used for international navigation." The 1958 Conference, however, chose to widen the category of straits to which this stipulation would apply by deleting the word "normally," *supra*, p. 61.

58. The *Corfu Channel* decision referred only to international straits joining two parts of the high seas, (1949) I.C.J. Rep., p. 28; the 1958 Convention referred to international straits joining one part of the high seas with another part of the high seas or territorial sea (art. 16.4); the Composite Text refers to international straits joining one part of the high seas or economic zone with another part of the high seas or economic zone or territorial sea (arts. 37, 45). See McDougal and Burke, *supra* note 41, at p. 175; R.R. Baxter, *The Law of International Waterways* (Mass., 1964), pp. 160-62.

59. See supra notes 33, 53, and accompanying texts.

60. See supra Ch. 3, note 8 and accompanying text. The attitude of strait states in this regard is evident by the draft proposal submitted in 1973 in the U.N. Seabed Committee by 8 strait states, which suggested that the coastal state may require warships to give advance notice, or obtain prior approval, before passage would be allowed, Doc. A/AC. 138/SC.II/L.18.

61. For a discussion of the effect on major naval fleets of the ambiguity of the 1958 Convention as regards passage through international straits see D.P. O'Connell, The Influence of Law on Sea Power (Manchester, 1975), pp. 97-113, 138-40.

62. See Doc. A/AC. 138/SC.II/L.15, L.48.

63. State Dept., Bureau of Intelligence and Research (Office of the Geographer), International Boundary Study - Series A - Limits in the Sea, Straight Baselines: Indonesia (1971), p. 8.

64. This is especially true in the case of the Philippine and Indonesian archipelagos, both of which contain straits of importance to maritime navigation. See Appendix, p. 139.

65. Article 47 of the Composite Text provides for the drawing of straight baselines joining the outermost parts of the outermost islands and drying reefs, provided that within these baselines are included the main island and that the ratio of water area to land area is between one to one and nine to one. The baselines are also to conform to "the general configuration" of the archipelago.

66. The comparable phrase in the Geneva Negotiating Text (art. 124.12) reads "routes normally used for international navigation through the archipelagic waters" (emphasis added). The omission in the Revised Text, however, would appear to make little difference.

67. Supra Ch. 2, notes 67, 68, and accompany text.

68. Supra, pp. 77-78

69. Fitzmaurice, supra note 41, at p. 114. See also McDougal and Burke, supra note 41, at pp. 603, 628-30; B.H. Brittin and L.B. Watson, International Law for Seagoing Officers, 3d. ed. (Annapolis, Md., 1972), p. 101.

70. This view is held, for example, by Pharand, The Law of the Sea of the Arctic (Ottawa, 1969), p. 12; L.C. Green, "International Law and Canada's Anti-Pollution Legislation," 50 Oregon Law Review (1970-71), p. 476; Brownlie, supra note 31, at pp. 213, 219.

71. Report of the International Law Commission Covering the Work of its Eighth Session, April 23 to July 4, 1956, Yearbook of the International Law Commission (1956), Vol. 2, p. 294.

72. Fitzmaurice, supra note 41, at pp. 109-10; see also McDougal and Burke, supra note 41, at pp. 578-92.

73. This is stated categorically by the Chairman of the Second Committee is his introductory note to Part II of the Revised Negotiating Text.

74. E.g., see W.E. Hall, A Treatise on International Law, 8th. ed. by Higgins (Oxford, 1924), p. 193.

75. According to Oppenheim, a majority of publicists of the time held the view that a strait more than 6 miles wide, yet narrow enough to be commanded by coastal batteries, could be considered territorial, International Law, Vol. I, 8th. ed. by Lauterpacht (London, New York, Toronto, 1955), p. 511.

76. Baxter, supra note 58, at p. 5. The precise location of the respective baselines from which both territorial seas are measured still remains a matter of dispute between both nations. See Jacques-Yvan Morin, "Les Progres Technique, la Pollution et L'evolution Recente du Droit de la Mer," 8 The Canadian Yearbook of International Law (1970), p. 185.

77. Baxter, supra note 58, at p. 6. In the case of The Bangor (1916), P. 181, the British court stated, obiter, that Chile could regard the waters as territorial in time of war, but that a capture within such waters was valid as between the belligerents, M.O. Hudson, Cases and Other Materials on International Law, 3rd. ed. (St. Paul, 1951), p. 402.

78. Supra note 72 and accompanying text.

79. Report of the International Law Commission Covering the Work of its Seventh Session, May 2 to July 8, 1955, Yearbook of the International Law Commission (1955), Vol. 2, p. 38.

CONCLUSIONS TO PART ONE

Part One of this dissertation has centered on an examination of the nature and history of the law governing international straits. In particular, this inquiry has attempted to point out the uncertainties that have characterized the legal regime of straits to the present time - especially as regards the 1958 Convention on the Territorial Sea - and to evaluate the efforts of the ongoing United Nations Conference on the Law of the Sea to draft new laws regulating these waterways.

This study has shown that the 1958 Convention was a vague and incomplete instrument which hardly took into account the complex issues involved - even at the time - in the question of passage through straits. These issues, which have greatly intensified over the last decade, have called for an effective arrangement capable of bringing together, on the one hand, the interests of coastal states who seek the legitimate protection of their security and resource interests and, on the other, those of maritime states who require assurance of unimpeded passage through the important maritime highways which are international straits.

The melding of the diverse and complex interests involved into one overall treaty capable of resolving them could not be a facile task, as evidenced by the lengthy and continuing efforts to draft a new regime for the oceans which began in earnest in Caracas in mid-1974. The outcome of the Third United Nations Conference on the Law of the Sea is still unclear. However, the product of its Sixth Session, the Informal Composite Negotiating Text, represents as near a consensus on the overall issues as is possible at this time, and the only guide to the possible outcome of that Conference.

When taking into account the contentious nature of many of the issues, those parts of the Composite Text relating to the regime of the territorial sea and passage through straits are, on the whole, a significant improvement over the 1958 Convention. The creation of a distinct regime for international straits and the specificity of these and other provisions relating as well to non-international strait areas of the territorial sea were indicative of the salience of these issues to the world community.

As noted in the foregoing examination of the relevant provisions of the Composite Text, however, this document also contains weaknesses and vague areas. Hence, the essential question is whether the combined provisions of that Text have provided for a regime of transit through straits which satisfies the minimum legitimate requirements of the riparian and user states alike. Given the trade-off nature of the negotiations, it was to be expected that not all parts of the Text would satisfy equally the demands of each interest group. It is well known, for example, that unimpeded passage through international straits has been a fundamental demand on the part of the United States and other major maritime powers, who have been willing to make concessions on other issues in favour of obtaining clear guarantees on this more vital one. The new sui generis regime of transit passage would appear to clearly satisfy this demand. It is less clear, however, whether in practice it will satisfy the minimum requirements of strait states.

The relevant provisions of the 1958 Convention were woefully inadequate. The coastal state, in any area of its territorial sea, including international straits, could prevent non-innocent passage solely on the basis of what it deemed to be "prejudicial" to its "peace, good order or security." While the Composite Text specifically itemizes which acts will be considered as non-innocent, these will now apply only to innocent passage in non-international strait areas of the territorial sea. In international straits, where the new regime of "transit passage" applies, the element of non-innocence has been removed altogether, and the right of transit passage cannot be suspended for any reason. Moreover, the power of international strait states to make and enforce regulations within these areas is minimal compared to those granted in non-strait areas of the territorial sea.

The virtual high seas nature of the transit passage regime is evidenced by the fact that overflight, and presumably submerged transit of submarines, none of which were permitted in any areas of the territorial sea under the 1958 Convention, would now be permitted through international straits and through archipelagic sea lanes.

In sum, the Composite Text has provided maritime navigation with a right of unimpeded passage through international straits which appears far removed from the possibility of arbitrary coastal state interference or regulations, especially as regards pollution standards. Such a regime, if eventually codified within a universally accepted convention governing the oceans, will be a welcome re-affirmation of the role of international straits as a corollary of the basic principle of the freedom of the seas in the face of the threat posed by the general extension of coastal state jurisdiction - both in distance and powers. Its provisions, however, may in practice prove inadequate to safeguard the minimum resource and security interests of strait states. Given a favourable political climate and the responsible use of this regime by navigational interests, there will likely be no controversy. However, when considering the long-term damage caused by routine operational pollution along these narrow routes, a matter which appears to lie outside of the effective jurisdiction allowed the coastal state, as well as the growing number of serious oil spills caused in many cases by faulty vessels and poor standards of seamanship, there is justifiable reason for strait states to remain apprehensive. When considering the probability that the new regime of the oceans will be governed by one overall treaty containing a series of interdependent provisions, the failure of one vital section would be a circumstance the international community could ill-afford. Given the "trade-off" nature of the negotiations at the ongoing Law of the Sea Conference and the attempt to arrive at a "package deal," there is reason to believe that the sections of the Composite Text dealing with offshore limits (Parts II - VI) will, for the most part, be left as they presently stand. Whether these will eventually be approved and ratified by a sufficient number of states and, if so, whether they will in practice be faithfully observed, are matters very much open to question. This writer has argued, however, that the Composite Negotiating Text is a significant improvement over the 1958 Convention and does represent as close a consensus on overall issues as is attainable at the present. As such, it is submitted that any movement for change should take place within the structure of the mentioned Text. On the assumption that such change is possible, it is further submitted that certain basic changes are necessary to achieve a more satisfactory and realistic balance between the need of strait states for protecting their recource and security interests and those of maritime states for unimpeded passage through these waterways.

Relating to the newly-created right of transit passage through international straits, it has been seen that this regime, as it presently stands, is not protective enough of the basic security and resource needs of strait states, and the following basic changes would appear necessary :

1. Like coastal states in non-international strait areas of the territorial sea, strait states and archipelagic states should be allowed

to establish their own laws and regulations for the prevention, reduction, and control of pollution, rather then merely "giving effect to applicable international standards." Considering the narrow and more hazardous nature of strait areas combined with the higher density of traffic and proximity to shore, the strait state should retain law-making powers at least as stringent as those given the coastal state in open areas of the territorial sea.

2. The provision allowing the strait state to take "appropriate enforcement measures" only when a vessel has violated a pollution regulation "causing or threatening major damage" is inadequate. The strait state should be allowed specific enforcement measures to deal with any violation of its pollution regulations, such as is allowed the coastal state in open areas of the territorial sea. When considering not only the hazards and traffic density in straits, but the fact that most pollution is attributable to routine operational discharges which are usually not noticeable immediately or after a single passage, this would appear to be a power essential to the welfare of the strait state. This measure should also be made available to archipelagic states for application in those sea lanes governed by the archipelagic sea lanes passage regime (a regime analogous to the transit passage regime).

3. There is some question as to whether submerged transit is permitted through international straits, though there appears to exist a consensus that a proper interpretation of the Composite Text allows such passage. Even considering another interpretation that would allow the strait state to deny such passage on the basis of the danger this would present to the safety of navigation, there is room for the argument that, at the least, submerged passage should be allowed only with a clearly

defined period of advance notice to the strait state. There is also some doubt as to whether submerged transit is permitted through archipelagic sea lanes, and it is submitted that - assuming such passage is permissible according to the Text - a requirement of advanced notice should also be stipulated.

4. The transit passage provisions make no specific mention of warships, though the consistent reference to "ships" would presumably include vessels of every character. Since a similar absence of specificity was a cause of some controversy under the 1958 Convention, it would be convenient for the Composite Text to specify clearly that the transit passage provisions apply equally to warships.

Relating to international straits falling outside of the transit passage regime (where non-suspendable innocent passage applies), coastal state powers, though broader than those available under the transit passage regime, are still inadequate to satisfactorily protect coastal resource and security interests:

1. The inclusion of only "wilful and serious" acts of pollution as non-innocent acts is clearly inadequate, particularly against operational pollution (see number 2 above). It is submitted that any act of pollution resulting from a violation of coastal state anti-pollution regulations should be regarded as non-innocent.

2. Though the Composite Text is a significant improvement over the 1958 Convention in that it lists 12 types of acts that would be regarded as non-innocent, the actual act of non-compliance by passing vessels with coastal state regulations is not included as one of these. This is especially disturbing when considering the fact that only violations of anti-pollution regulations carry specified enforcement powers. Though

the coastal state is allowed to make regulations regarding certain activities which are also listed as non-innocent acts (e.g., fishing), this is not always the case (e.g., the state can make regulations regarding prevention and reduction of pollution, but only a "wilful and serious" act of pollution is regarded as non-innocent). Since the coastal state is given law-making powers over 8 matters, each of which is clearly of a vital nature to the state, it is only logical that an act of non-compliance with any of these be regarded as a non-innocent act.

3. The coastal state is empowered to make laws and regulations regarding 8 subject areas. As indicated above, however, only the violation of anti-pollution regulations carry specific enforcement powers. It is submitted that these specific enforcement measures should also apply to the violation of any of the coastal state's regulations which are adopted in conformity with the provisions of the Composite Text.

4. The Composite Text, in terms identical to those of the 1958 Convention, stipulates that warships could be required to leave the territorial sea if they do not "comply with laws and regulations of the coastal state concerning passage through the territorial sea." Since there is no indication as to what restrictions these laws and regulations might entail, and there has been considerable debate surrounding this clause since the drafting of the 1958 Convention, specification of coastal state powers would appear to be necessary. In this regard, it is submitted that coastal states be permitted to require advance notice only when the passage of warships presents a threat to the security of that coastal state.

These changes would appear to be at once essential to the strait state but not of a sufficiently discretionary nature to threaten the unimpeded use of international straits, especially of those subject to the transit passage regime. On the basis of the vital interests these competing matters represent to both strait states and user states, the absence of a minimum satisfactory balance between them will undoubtedly spell the failure of what is perhaps the most crucial aspect of the on-going effort to draft a new law of the sea. Worse yet, such a failure could seriously threaten the fundamental right of maritime navigation to the unencumbered use of these passageways, a threat that could effectively spell the end of the traditional freedom of the seas.

APPENDIX

STRAITS OF SIGNIFICANCE TO INTERNATIONAL NAVIGATION*

I. THE MAJOR STRAITS (not listed in order of importance)

STRAIT	SOVEREIGNTY (on either side)	LOCATION	LEAST WIDTH (in nautical miles)
Dover Strait	France/U.K.	France-England	18
Strait of Hormuz	Iran/Oman	Entrance to Persian Gulf	21
Strait of Gibraltar	Spain/Morocco/U.K.	Entrance to Mediterranean Sea	8
Strait of Bab-El-Mandeb	France/Yemen/Ethiopia	Southern Entrance to Red Sea	9
Dardanelles/Bosporus	Turkey	Entrance to Black Sea	750 yds.
Strait of Malacca	Indonesia/Malaysia	Sumatra-Malaysia	8
Strait of Singapore	Indonesia/Malaysia/Singapore	Sumatra-Malaysia	2
Danish Straits:			
Skagerrak	Denmark/Norway	Denmark-Norway	61
Kattegat	Denmark/Sweden	Denmark-Sweden	40
Ore Sund	Denmark/Sweden	Denmark-Sweden	2
Florida Strait	U.S./Cuba	Key West-Cuba	82
Windward Passage	Cuba/Haiti	Cuba-Haiti	45
Mozambique Channel	Malagasy Rep./Mozambique	Malagasy Rep.-Mozambique	30
Bashi Channel (Luzon Strait)	Philippines/Taiwan	Luzon-North Is.	53
Selat Lombok	Indonesia	Bali-Lombok	11
Ombar Strait	Indonesia	Alor-Timor	16
Western Chosen Strait	Japan/Korea	Korea-Tsushima	23
Mona Passage	U.S./Dominican Rep.	Mona Is. (P.R.)-Dominican Rep.	33

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*Compiled from the following sources: U.S. Dept. of State, *Sovereignty of the Sea*, Geographer's Bulletin No. 3, revised 1969, U.S. Dept. of State Publication No. 7849, pp. 22-27; Commander R.H. Kennedy, "A Brief Geographical and Hydrographical Study of Straits Which Constitute Routes for International Traffic," U.N. Doc. A/CONF. 13/6, Prep. Doc. #6, pp. 114-144; Office of the Geographer, U.S. Dept. of State, *Map of World Straits Affected by a 12-Mile Territorial Sea*, No. 564375, Dec., 1974; R.W. Smith, "Strategic Attributes of International Straits," 2 *Maritime Studies and Management*, No. 2 (Oct., 1974), pp. 94-95.

II. OTHER IMPORTANT STRAITS (not listed in order of importance)

STRAIT	SOVEREIGNTY (on either side)	LOCATION	LEAST WIDTH (in nautical miles)
Makassar Strait	Indonesia	Borneo-Celebes	62
Karimata Strait	Indonesia	Borneo-Sumatra	130
Gasper Strait	Indonesia	Bangka Is.-Billiton Is.	8
Manipa Strait	Indonesia	Buru Is.-Ceram Is.	13
Wetar Passage	Indonesia	Wetar Is.-Timor	12
Sunda Strait	Indonesia	Java-Sumatra	2
Formosa Strait	Taiwan/People's Rep. China	Taiwan-Mainland China	74
Van Dieman Strait	Japan	Kyushu Is.-Ryukyus Is.	16
Balabac Passage	Malaysia/Philippines	Palawan Is.-Sabah Is.	27
San Bernardino Strait	Philippines	Luzon Is.-Sumar Is.	3
Surigao Strait	Philippines	Leyte Is.-Mindanao Is.	10
Mindoro Strait	Philippines	Calamian Is.-Mindoro Is.	20
Verde Island Passage	Philippines	Luzon Is.-Mindora Is.	4
Palk Strait	Sri Lanka/India	Sri Lanka-India	3
Bass Strait	Australia	Australia-Tasmania	14
Torres Strait	Australia-Papua	Australia-Papua	2
Cook Strait	New Zealand	North Is.-South Is.	12
Dominica Channel	France/U.K.	Guadeloupe-Dominica	16
Martinique Channel	France/U.K.	Dominica-Martinique	22
St. Lucia Channel	France/U.K.	Martinique-St. Lucia	17
St. Vincent Passage	U.K.	St. Lucia-St. Vincent	23
Turks Is. Passage	U.K.	Turks Is.-Caicos Is.	13
N.W. Providence Channel	Bahamas	Bahamas	26
Yucatan Channel	Cuba/Mexico	Cuba-Yucatan Penins.	105
Old Bahamas Channel	Cuba/Bahamas	Cuba-Bahamas	12
St. of Juan de Fuca	U.S./Canada	South of Vancouver Is.	9
Jacques Cartier Passage	Canada	Quebec Coast-Anticosti Is.	15
Belle Isle Strait	Canada	Labrador-Newfoundland	9
Cabot Strait	Canada	Newfoundland-Cape Breton Is.	57
Strait of Magellan	Argentina/Chile	Tierra del Fuego-Mainland S.A.	2
Estrecho de la Maire	Argentina	Tierra del Fuego-Islade Los Estados	16
Bering Strait	U.S./U.S.S.R.	Alaska-Siberia	19
North Channel	U.K.	Northern Ireland-Scotland	11
St. Georges Channel	Ireland/U.K.	Ireland-Wales	42
St. between Corsica & Elba	France/Italy	Corsica-Elba	27
Strait of Bonifacio	France/Italy	Corsica-Sardinia	6
Strait of Messina	Italy	Sicily-Italy	2
Strait of Otranto	Albania/Italy	Albania-Italy	41
Kithera Strait	Greece	Kithera Is.-Andikithera Is.	25
Karpathos Strait	Greece	Karpathos Is.-Rhodes Is.	23
Entrance to Gulf of Finland	U.S.S.R./Finland	Estonia-Finland	17
Bornholmsgat	Denmark/Sweden	Denmark-Sweden	19
Strait of Tiran	Egypt/Saudi Arabia	Sinai Penins.-S. Arabia	3

PART TWO

INTEROCEANIC CANALS

INTRODUCTION TO PART TWO

As stated in an earlier section[1] artificial canals, whether used for inland navigation or connecting two parts of the high seas, consist of internal waters and thus are not subject to a right of innocent passage for foreign vessels as are international straits. Nor have they been the object of regulation by a general international convention, as have straits. However, in the case of the Suez, Panama, and Kiel Canals, the vital importance of these waterways to maritime communication and the similarity of the respective treaty arrangements by which each is governed[2] have combined to give them a special — albeit undefined — status in international law. The implication is that the riparians of these waterways have accepted some form of limitation of their sovereignty over their canals in favour of the navigation of the international community. They are thus often referred to as being "internationalized." However, the precise meaning and implication of this term in regards the extent of freedom of passage and the source from which such a limitation of sovereignty has been derived has long been a contentious matter among jurists, publicists, and the states affected. According to Oppenheim, internationalization is

> a term which has not yet acquired an established meaning, but which is beginning to be used to denote the status of an area of territory or water which has been dedicated by treaty to the public use of all or a large number of states.[3]

To O'Connell, a canal becomes internationalized when dedicated to free navigation without discrimination,

> the only certain incident of internationalization... (being) that the merchant ships of all countries may pass without hindrance through the canal in time of peace.[4]

This same view is advocated by Obieta who, however, prefers the designation "regime of internationality" instead of "internationalization," since the latter is often used in another sense to refer to the international administration of a canal by an international organization or commission.[5] Whether this limitation of sovereignty — whatever its designation or extent — is the result of a contractual arrangement, volunteered by the riparian, imposed by the world community, or a combination of these, remains obscure. In the case of international straits, we have seen that freedom of passage is a corollary to the fundamental principle of the freedom of the seas hardened by customary law and reaffirmed by positive international law, with debate now revolving around the coexistence of this recognized right with the right of coastal states to protect their resources and guard their security. In the case of interoceanic canals, however, the question involves the alleged creation or evolution of a right of transit — where none existed before — on the basis of the treaty arrangements governing them. At issue here is whether the benefit the world community derives from the use of a waterway owned and operated by a territorial sovereign[6] amounts to a legally enforceable right, or merely a privilege granted by that sovereign.

Part Two of this dissertation, then, will inquire into the legal status of interoceanic canals by determining the extent to which there exists a limitation on the sovereignty of the riparian in favour of the world community and examining the possible foundations upon which such a limitation could be based.

Chapter One will examine separately the treaty arrangements governing each canal, and the practice of both the riparian state and the world community as regards each waterway from the time of construction to the present.

Chapter Two will compare the conventions governing the three waterways to establish the precise areas of difference and similarity and to determine whether there is a "canal regime."

Chapter Three will examine the various concepts and doctrines in international law that at times have been ascribed to these waterways or upon which community rights are allegedly based.

Chapter Four will inquire into the concept of neutralization and the extent to which these waterways can be said to be "neutralized." These concepts will be evaluated in the face of the treaty arrangements and the practice governing the three canals.

REFERENCES TO INTRODUCTION

1. See *supra*, Part One, pp. 3-4.

2. Though other canals may connect two seas, they are not of international importance. Nor have they been the subject of treaties opening them to free usage by the vessels of all nations. Examples are the Corinth Canal, the Baltic-White Sea Canal, the Gota Canal, and the Volga-Don Canal. During the period from mid-June, 1976 to mid-June, 1977, the Suez Canal had 19,936 transits with a total cargo tonnage of some 213 million tons, *New York Times*, September 16, 1977, Sec. D, p. 8; the Kiel Canal in 1972 had 80,204 transits with a total cargo tonnage of 43.4 million tons, J.R.V. Prescott, *The Political Geography of the Oceans* (New York, 1975), p. 111. The Panama Canal, during fiscal year 1975 had 13,609 transits with a total cargo tonnage of 135 million tons, Panama Canal Company, *Annual Report* for fiscal year 1975, p. 44.

3. L. Oppenheim, *International Law*, Vol. II, 7th ed., edited by H. Lauterpacht (London, 1955), p. 244, N. 1.

4. D.P. O'Connell, *International Law*, Vol. I (London, 1965), pp. 641-42.

5. J.A. Obieta, *The International Status of the Suez Canal*, 2nd ed., (The Hague, 1970), p. 46; see also R.R. Baxter, *The Law of International Waterways* (Cambridge, Mass., 1964), p. 311.

6. While the Suez and Kiel Canals are owned and operated by the territorial sovereigns of the states through which the waterways run, the Panama Canal is operated by a foreign sovereign, the United States. By the terms of the Hay-Bunau Varilla Treaty of 1903 (96 *British and Foreign State Papers*, p. 553) the United States acquired, in perpetuity, rights "as if it were sovereign" over a strip of land 10 miles wide across the Isthmus to construct, maintain, operate, and protect the Canal (arts. 2, 3). Though there has been much debate as to whether Panama retains "titular sovereignty" over this area, the Canal Zone, all its adjacent waters, and all aspects of administration of the Canal have, since its construction, been under the exclusive control of the United States. For this reason, any mention of the sovereign or riparian state in the case of the Panama Canal will refer to the United States.

   The United States and Panama recently signed a treaty providing for the gradual "Panamization" of the Canal and the Canal Zone to be completed by December 31, 1999, with the termination of the treaty on that date Panama will assume full control over the Canal and Canal Zone, "Panama Canal Treaty," September 7, 1977, rep. in 16 *International Legal Materials* (1977), p. 1022.

   The new Treaty and an additional treaty governing the Neutrality of the Canal were approved by a Panamanian plebiscite on October 23, 1977, *The Star and Herald*, Panama, R.P., October 24, 1977, p. 1. The United States Senate ratified the Neutrality Treaty on March 16, 1978 (*ib.*, March 17, 1978, p. 1), and The Panama Canal Treaty on April 18, 1978 (*ib.*, April 19, 1978, p. 1).

CHAPTER I

HISTORICAL BACKGROUND: THE CONSTRUCTION AND LEGAL FOUNDATIONS

A. THE SUEZ CANAL

1. Construction to 1888: Legal Foundations

The construction of a sea level canal across the Isthmus of Suez in Egypt was based on two concessions, an agreement, and an imperial firman granted by the Viceroy of Egypt to F. de Lesseps, representing a private company known as the Compagnie Universelle du Canal Maritime de Suez.[1] Though these were concluded with a private person in favour of a company, their contents are an important guide to the status of the prospective canal.

The first Concession granted on November 30, 1854,[2] gave de Lesseps the right to form a company for the purpose of constructing a canal connecting the Mediterranean and Red Seas. The Concession was given for a period of 99 years, after which the Canal would revert to the Egyptian Government (art. 3). No stipulation was included providing for third-party rights, though article 6 stated:

> The rates of the transit charges of the Suez Canal... shall always be the same for all nations; no special advantage may ever be stipulated for the exclusive benefit of any of them.

On January 5, 1856, the Viceroy granted de Lesseps a new Concession[3] clarifying and supplanting the previous one. Article 14 of that instrument stipulated that the Canal and the ports belonging to it were to be

> open forever, as neutral passages to every merchant vessel crossing from one sea to the other, without any distinction, exclusion, or preference with respect to persons

> or nationalities, in consideration of the payment of the fees, and compliance with the regulations established by the universal company, the concession-holder, for the use of the said canal and its appurtenances.

Since Egypt at the time was under the suzerainty of the Ottoman Empire, the document required the ratification of the Sultan of Turkey who, under pressure from Great Britain, refused to grant his sanction.[4] Despite this, work on the Canal was formally begun in April, 1859.[5] After protracted negotiations, and with the Canal near completion, the Viceroy and the French company concluded a convention on February 22, 1866,[6] implementing British demands (including the abolition of forced labour) and approving the former concessions (art. 17). This then paved the way for the Sultan's official sanction by way of a firman of March 19, 1866.[7] From that point on, work proceeded rapidly and the Canal was officially opened on November 17, 1869.[8]

From the time of its inauguration up to the signing of the Constantinople Convention in 1888[9] the only instrument providing for freedom of navigation through the Canal remained article 14 of the 1856 Concession. The controversial matter is whether that article, contained within a contract of a private nature between the Egyptian Government and de Lesseps' Compagnie Universelle, gave rise to any international rights. According to one commentator

> No international agreement defining the status of the waterway existed. The passage of ships was not a right but a privilege granted by the Ottoman Empire to other nations. Only rights granted by contract to a private company could be invoked; but nations in case of dispute could not base any claims on such rights.[10]

In the view of De Visscher, international rights can be derived from a unilateral declaration, but

> Ne peut jamais être présumée ni déduite a la légère des seuls termes d'un contrat de concession qui, normalement, n'est applé à régir que des situations de droit interne.[11]

Obieta goes to great lengths in arguing that despite the unilateral and private character of the concessions, a right of transit for merchant vessels in time of peace was created on the basis of the intention of the sovereign and the acceptance of the declaration by the international community.[12] In fact, from the date of the opening of the Canal in 1869 up to the time of the signing of the 1888 Convention, the ships of all nations passed freely except for a short period during the landing of British troops in 1882. During the Franco-Prussian War in 1870 merchant ships of both belligerents transited the waterway, and during the Russo-Turkish War of 1877 the Canal was open both to the merchants and war vessels of the belligerents, even though Egypt was part of the Turkish dominion.[13] It appears, however, that British pressure was more responsible for this than any sense of community obligation on the part of the Ottoman Empire.[14] In the absence of any international treaty, it remains a moot point whether the unrestricted passage between 1869 and 1888 constituted an international right or merely a tolerence on the part of the Ottoman Empire. Moreover, the question of third-party rights to the use of the Canal might more appropriately be examined when considering the totality of arrangements governing the Canal to the present time.[15] However, it is difficult to accept Obieta's contention that after the opening of the Canal no government made any request for a formal convention because "everyone of them knew exactly where it stood with regard to the Canal."[16] While the passage of merchant vessels in time of peace appears to have been taken for granted, the status of the Canal as regards its neutrality seems to have been very much in doubt.

As early as 1856 at the Congress of Paris, and later in 1877, de Lesseps proposed that the Powers should guarantee the Canal's neutrality and freedom of passage for merchant ships, with the transit of warships subject to previous permission from the Egyptian Government, a position supported by all the leading European Powers except Britain.[17] However, because of British pressure for sole control over the passage to India, the matter was not pressed any further. After the rebellion of Arabi Pashi in 1882, which forced the British Government to occupy Egypt in order to protect the Canal, the inadequacy of the arrangements governing the waterway become evident.[18] The following January Lord Granville proposed a draft to the Powers that would serve as a basis for discussion on an international status for the Canal.[19] This brought no immediate response, but in March, 1885 the Powers signed the Declaration of London Relative to the Free Navigation of the Suez Canal, and agreed to meet in Paris to discuss the drafting of a definitive agreement regarding freedom of passage through the Canal.[20] A Commission met later in the same month in Paris and prepared a Draft Treaty[21] which, after some changes, was signed in Constantinople on October 29, 1888.

The "Convention Between Great Britain, Austria-Hungary, France, Germany, Italy, The Netherlands, Russia, Spain, and Turkey, Respecting the Free Navigation of the Suez Maritime Canal" (Constantinople Convention)[22] was concluded, according to its Preamble, in order to establish

> by a Conventional Act, a definitive system destined to guarantee at all times, and for all the Powers, the free use of the Suez Maritime Canal, and thus to complete the system under which the navigation of this Canal has been placed by the Firman of His

> Imperial Majesty The Sultan, dated February 22, 1866... and sanctioning the Concessions of His Highness the Khedive....

The wording of the Preamble has caused some question as to whether the Convention incorporates the previous Concessions, thus raising the status of the Suez Canal Company to that of an international company subject to international law, or merely recognizes them, leaving the Canal Company as a private body.[23] There has also been some debate as to whether the Preamble has the same binding effect as the text of the Treaty.[24] (This question would now be settled in the affirmative by the 1969 Vienna Convention on the Law of Treaties.[25]) In any case, article 14 of the 1856 Concession, the sole instrument guaranteeing freedom of passage (for merchant vessels) prior to 1888, is well buttressed by the text of the Constantinople Convention. Article 1 stipulates that the Canal

> shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

The parties also agree in the same article "not in any way to interfere with the free use of the Canal, in time of war as in time of peace." Moreover, the Canal "shall never be subjected to the exercise of the right of blockade." Article 4 indicates that since the Canal is to remain open "in time of war as a free passage, even to the ships of belligerents," no act of war or hostility "nor any act having for its object to obstruct the free navigation of the Canal" can be committed in the Canal, its ports, or within a radius of 3 miles from these ports, "even though the Ottoman Empire should be one of the belligerent Powers." The same article also stipulates that belligerent war vessels are not allowed to take on fresh supplies in the Canal or its ports except when strictly necessary, or to stay in the ports of access for more than 24 hours except in case of distress. Their transit through the Canal "shall be effected with the least possible delay." A period of 24 hours is to elapse between the sailing of a belligerent ship from a port of access and the departure of a ship belonging to an enemy power. According to article 5, belligerent Powers in time of war are not to disembark or take on troops or war material in the Canal or its ports. By the terms of article 7, the Powers are not to keep any warships in the waters of the Canal, though each Power may station a maximum of two warships in the ports of access of Port Said and Suez. This right, however, is not to be exercised by belligerents.

Article 10 stipulates that these and other provisions cannot interfere with the measures the Sultan and the Khedive "might find... necessary to take for securing by their own forces the defence of Egypt and the maintenance of public order." According to article 11, however, these measures "shall not interfere with the free use of the Canal," and the erection of permanent fortifications is prohibited.

2. The Practice After 1888

During the period between the signing of the Constantinople Convention in 1888 and the outbreak of the First World War, the terms of the Convention appear to have been kept by parties and non-parties alike.[26] In fact, during the Italo-Turkish War of 1911-12 the Egyptian Government authorized the boarding and disarmament of five Turkish gunboats which had failed to leave Port Said after 24 hours[27] as required by article 4 of the Convention, and Italian warships passed freely.[28] The subsequent practice, however, was altogether another matter.

Though the Egyptian Government issued a Proclamation on August 15, 1914 providing for free passage by merchant vessels of all nations and by warships according to the terms of the Constantinople Convention,[29] the Canal was in fact closed to the warships of the Central Powers[30] from the moment of outbreak of hostilities in August, 1914. In November, 1914, after Turkey joined the Central Powers, Britain declared herself at war with the Ottoman Empire, which placed Egypt in a difficult position since the latter was still nominally a part of the Ottoman Empire. As a result, Great Britain terminated the Turkish suzerainty over Egypt on December 18 and assumed a protectorate over the latter. Egypt was then effectively drawn into the war against Turkey.[31] Two months later the Canal itself became the front line of defense against a Turkish invasion force by land which was successfully repelled by the British Canal Defense Force.[32] Enemy sorties, including the laying of mines in the Canal, continued until June, 1915.[33] From the outbreak of the War, a number of enemy vessels were seized as prize.[34]

Traffic flowed normally during the period between the two World Wars. In 1922 Britain terminated her protectorate over Egypt and the latter was declared an independent state, though subject to defense and security arrangements in favour of the former.[35] It was not until 1936 that differences were adjusted and the Anglo-Egyptian Treaty was signed on August 26.[36] By its terms Egyptian independence was formally acknowledged and the British occupation terminated, but it was also agreed that until Egypt was in a position to defend the security and navigation of the Canal, Great Britain was authorized to "station forces in Egyptian territory in the vicinity of the Canal... with a view to ensuring in cooperation with the Egyptian forces the defence of the Canal" (art. 8).

From the beginning of the Second World War the Canal was closed to enemy shipping. British troops took stores in the Canal and embarked and disembarked troops and war material,[37] in violation of articles 4, 5, and 7 of the Constantinople Convention. During 1941 the Canal Zone as well as the Canal itself suffered repeated bombings, machine-gunnings, and parachute minings by German and Italian aircraft. Numerous vessels, including neutral merchant vessels, were disabled or sunk in the Canal.[38]

After the War, in May, 1947, the Diplomatic Missions in Cairo were informed that the states of all warships intending to transit the Canal must notify Egyptian authorities ten days in advance.[39]

The right of free passage was put to its sternest test following the establishment of the State of Israel. Upon the opening of hostilities in Palestine in May 15, 1948, the Egyptian Government issued a Proclamation providing for the inspection of vessels in the ports of Alexandria, Suez, and Port Said.[40] A Proclamation three days later provided for the confiscation of munitions or any other goods going or coming from Israel as war contraband.[41] Less than two months later another Proclamation established a Prize Court and stipulated that any goods having as their purpose the "intensification of the zionist war effort" would be considered as prize.[42]

The various stages of open and suspended hostilities characterizing the relations between Israel and Egypt since 1948 provide an unclear background against which to evaluate Egypt's actions. Even after the General Armistice Agreement of February, 1949,[43] the restrictive measures against Israeli and Israel-bound vessels continued on the grounds that the armistice merely suspended hostilities but did not end the state of war and Egypt's recourse to belligerent rights.[44] This position was upheld by the Egyptian Prize Court on the basis that the provisions stipulated in articles 4, 5, and 7 of the Constantinople Convention were subject to article 10, which provided that these articles shall not "interfere with the measures which the Sultan of Turkey and the Khedive of Egypt might find it necessary to take for securing by their own forces the defence of

Egypt and the maintenance of public order." The Court maintained that "the prohibitions contained in those articles cannot interfere with the natural right of a state to preserve its own existence," and consequently that "the provisions of article 11 of the Convention... cannot be construed as a restriction upon the rights of Egypt," its purpose being only "to confirm what is said in article 1 about free passage through the Canal in time of war and peace; but reasonable and necessary measures taken by Egypt do not interfere with such passage."[45]

In July, 1951 Israel requested the Security Council to consider the restrictions placed by Egypt on its use of the Canal, arguing that these violated both the Constantinople Convention and the General Armistice Agreement.[46] On September 1, 1951 the Security Council adopted a resolution[47] calling upon Egypt to

> terminate the restrictions on the passage of international commercial shipping and goods through the Suez Canal wherever bound and to cease all interference with such shipping beyond that essential to the safety of shipping in the Canal itself and to the observance of the international conventions in force.

Egypt, however, continued to bar ships of Israeli registration and any cargo she considered as contraband.[48] Another practice was the requirement of certificates of ultimate destination of cargo passing through the Canal guaranteeing that the cargo would not be reshipped to Israel from the country to which it was consigned.[49] In addition, ships which had previously carried cargo to Israel were blacklisted.[50]

In 1954 Great Britain and Egypt concluded an Agreement[51] providing for the withdrawal of British forces from the Canal base. Article 8 of that Agreement stated:

> The two Contracting Governments recognize that the Suez Maritime Canal, which is an integral part of Egypt, is a waterway economically, commercially and strategically of international importance, and express the determination to uphold the Convention guaranteeing the freedom of navigation of the Canal signed at Constantinople on the 29th of October, 1888.

On July 26, 1956, by way of a Presidential Decree,[52] the Egyptian Government nationalized the Suez Canal Company, placing the administration of the Canal in the hands of an Egyptian operating authority. Though no mention was made in the Decree of any alteration in the regime of navigation through the Canal, the announcement was met by swift reaction from the United States, Great Britain and France, who in a Tripartite Statement dated August 2,[53] argued that the action "threatens the freedom and security of the Canal as guaranteed by the Convention of 1888." The statement also called for an international conference to consider what

> steps should be taken to establish operating arrangements under an international system designed to assure the continuity of operation of the Canal as guaranteed by the Convention of October 29, 1888, consistently with legitimate Egyptian interests (para. 4).

There was little basis on which to argue that the nationalization of the Canal Company had any effect on the legal regime of the Canal. The international regime of the Canal — as far as it could be said to have existed prior to the nationalization — was the result of an offer to the international community made by the sovereign, not by the Canal Company. Though the 1856 Concession was an act of internal law giving a private company the right to construct and operate the Canal, the sovereign made an offer of freedom of passage to the international community by way of that instrument, which was later enlarged by the 1888 Convention. These international acts, however, did not make the Company itself an agency of the international community. That Company was in fact responsible only to the Egyptian Government and had no rights or obligations *vis-a-vis* the international community. It appears, however, that the international community considered the mere presence of the Company as an intermediary element that could keep Egypt from interfering with the navigational regime of the Canal.[54] Nevertheless, this did not prevent Egypt from applying restrictive measures to Israeli and Israel-bound shipping after the 1949 Armistice.

A conference held in London between August 16 and 23, and attended by 22 nations drew up a proposal[55] calling for the reaffirmation and revision of the Constantinople Convention and the establishment of a users association with advisory, consultative, and liaison functions. As a result of Egypt's refusal to negotiate on the basis of this proposal, the British and French Governments brought the matter to the attention of the Security Council on September 12, 1956. On October 13 the Security Council adopted a resolution[56] stipulating that any settlement of the Suez question should meet six requirements. The first of these was that

> there should be free and open transit through the Canal without discrimination, overt and covert — this covers both political and technical aspects.

Within two weeks, on October 31, Israel attacked Egypt, and the following day British and French forces invaded in order to safeguard the use of the Canal.[57] As a result, Egypt sank ships in the Canal to block all navigation.[58]

Shortly after the re-opening of the Canal, the Egyptian Government, on April 24, 1957, made a Declaration "in fulfillment of their participation in the Constantinople Convention of 1888" enclosed in a letter sent to the Secretary-General of the United Nations.[59] Among its most notable provisions are the following:

> 1. Reaffirmation of Convention:
>
> It remains the unaltered policy and firm purpose of the Government of Egypt to respect the terms and the spirit of the Constantinople Convention of 1888 and the rights and obligations arising therefrom. The Government of Egypt will continue to respect, observe, and implement them.
>
> 2. Observance of the Convention and the Charter of the United Nations:
>
> While reaffirming their determination to respect the terms and the spirit of the Constantinople Convention of 1888 and to abide by the Charter and the principles and purposes of the United Nations, the Government of Egypt are confident that the other signatories of the said Convention and all the others concerned will be guided by the same resolve.
>
> 3. Freedom of Navigation, Tolls, and Development of the Canal:
>
> The Government of Egypt are more particularly determined:
>
> (a) to afford and maintain free and uninterrupted navigation for all nations within the limits and in accordance with the Constantinople Convention of 1888.
>
> . . .
>
> 10. Status of This Declaration:
>
> The Government of Egypt makes this Declaration, which re-affirms and is in full accord with the terms and spirit of the Constantinople Convention of 1888, as an expression of their desire and determination to enable the Suez Canal to be an efficient and adequate waterway linking the nations of the world and serving the cause of peace and prosperity.
>
> This Declaration, with the obligations therein, constitutes an international instrument and will be deposited and registered with the Secretariat of the United Nations.

The Declaration appeared to have little effect on Egyptian policy with regard to restrictions against Israel. Within three months of the Declaration, a Danish vessel, the Brigitte Toft, chartered to an Israeli company and carrying rice to Israel, was detained. The vessel was later allowed to pass after Egyptian authorities removed an Israeli crew member.[60] During that same year at least three other non-Israeli vessels were detained for as long as five days.[61] No incidents occurred in 1958, but during the following year at least six more non-Israeli vessels were detained with most later being allowed to proceed only after surrendering their cargo.[62] The Prize Courts of the United Arab Republic held that, under the established law of prize, these vessels lost their neutral character since they were chartered by the enemy and, consequently, the enemy goods on board were subject to seizure as prize.[63] A further incident occurred in December, 1961 when a Portuguese vessel carrying war material to Goa was refused passage apparently as an Egyptian measure of support for the Indian aggression against Goa.[64] No further incidents were reported between 1962 and 1965, but in August, 1966 the cargo of a Dutch freighter travelling to Great Britain was seized ostensibly on the grounds that an Israeli bank in Geneva had financed the sale of its cargo.[65]

During the decade following the Egyptian Declaration, then, Egypt's policy was characterized by a refusal to allow the passage of Israeli vessels and by restrictions on the passage of vessels trading with Israel, an issue that was instrumental in leading to another war with Israel. In June, 1967, with the outbreak of the "Six-Day War," the Canal was immediately blocked to all navigation for the second time in ten years. Israeli troops occupied the entire East Bank of the Canal and prevented Egyptian attempts to clear the Canal of sunken Egyptian vessels which would have released some 14 neutral vessels trapped in the Great Bitter Lake. In August of the same year all maintenance work was stopped, with Israel refusing to withdraw from its occupied positions and Egypt using the Canal as a bargaining instrument to persuade the major powers to enforce a withdrawal.[66] The Canal remained closed until June 5, 1975.[67] As part of the U.S.-Mediated Second Disengagement Agreement of September 4 of that year Egypt agreed to the passage of non-Israeli vessels carrying non-strategic cargo to Israel.[68] On November 4, 1975 the Greek vessel *Olympus* carried the first Israeli cargo through the Canal in 16 years.[69]

B. THE PANAMA CANAL

1. 1846 to Construction: Legal Foundations

Though the United States expressed interest in a canal joining the Atlantic and Pacific Oceans as early as 1826,[70] it was after the Mexican War of 1846 that serious consideration was given to the matter. The acquisition by the United States of vast territories extending to the Pacific coast now made the idea of linking the two oceans a commercial and strategic necessity.[71] On December 12 of that year the United States took its first step by concluding a treaty with Colombia (then called Nueva Granada, of which the Isthmus of Panama was a province). Though the Mallarino-Bidlack Treaty[72] was concluded primarily to regulate the transit of American citizens and merchandise across the Isthmus, it was also meant to apply to any future means of communication that might be constructed across that territory. Under article 35 of the Treaty

> the United States guarantee, positively and efficaciously, to New Granada... the perfect neutrality of the before-mentioned Isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this Treaty exists.

The United States was also contemplating canal routes across other parts of Central America, especially through Nicaragua. Since Great Britain had already established control over the eastern end of the proposed canal route in Nicaragua and was determined to participate in any such venture,[73] the United States and Great Britain concluded the Clayton-Bulwer Treaty on April 19, 1850.[74] By its terms, neither country would seek to obtain exclusive control over any canal constructed through any part of Central America (arts. 1, 8). Any future canal was to be "for the benefit of mankind, (and) on equal terms to all" (art. 6). In addition, such a canal,

> being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford (art. 8).

With the onset of the Civil War and the period of reconstruction, American interest waned. Ferdinand de Lesseps, however, inspired by his success at directing the construction of the Suez Canal, formed a French company in 1879 financed by private investors (The Compagnie Universelle du Canal Interocéanique) and purchased the rights granted to another French company a year earlier by the Colombian Government.[75] The Salgar-Wyse Contract of 1878[76] is now of interest only as an indicator of the intention of the parties. Article 5 states that

> The Government of the Republic declares neutral for all time, the ports of one and the other end of the Canal, and the waters of the same, from one to the other sea; and consequently in case of war between other nations or between one or other of these and Colombia, the transit through the Canal shall not be interrupted for that reason; and merchant vessels and individuals of all nations of the world may enter said ports and navigate the Canal without being molested or detained. In general, any ship may navigate the Canal freely without distinction, exclusion, or preference of persons or nationalities.

Work by the French team began in 1881. After eight years, the loss of some 20,000 lives, and a cost in excess of $290 million, the Company suspended all operations in 1889.[77]

The Spanish-American War in 1898 provided another turning point for the United States. The sailing of the battleship Oregon around South America in order to arrive at the theatre of war focused American opinion more sharply on the need for a canal.[78] The United States was still bound to joint control of any future canal with Great Britain under the 1850 Clayton-Bulwer Treaty.[79] Great Britain, however, tied down by the Boer War and apparently disenchanted with Central America as a further sphere of influence, was now willing to hand the task over to the Americans so long as she received a guarantee of free transit through the canal.[80] On November 18, 1901 the two countries signed the Hay-Pauncefote Treaty,[81] which subject to the 1977 Treaty between the United States and Panama, remains the basic legal instrument governing the status of the Canal.

Superseding the Clayton-Bulwer Treaty, but "without impairing the 'general principles' of neutralization established in article 8 of that Convention" (Preamble, art. 1), the Treaty gave to the United States the exclusive right to construct an interoceanic canal" by whatever route may be considered expedient," and to manage and regulate the same (Preamble, art. 2). According to article 3,

> The United States adopts as the basis of the neutralization of such ship canal, the following rules, substantially as embodied in the Convention of Constantinople, signed the 28th of October, 1888, for the free navigation of the Suez Canal,[79] that is to say:
>
> 1. The Canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of

> traffic, or otherwise. Such conditions and charges will be just and equitable.
>
> 2. The Canal shall never be blockaded, nor shall any right of way be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the Canal as may be necessary to protect it against lawlessness and disorder.

By the terms of the same article, belligerent war vessels are not to take stores in the Canal, and their transit is to be effected "with the least possible delay" (para. 3). Belligerent vessels are not to embark or disembark troops or war material in the Canal (para. 4); neither are they to remain in the waters of the canal, or within 3 miles of either end, for more than 24 hours (para. 5). The Treaty also stipulates that

> no change of territorial sovereignty or of the international relations of the country or countries traversed by the beforementioned Canal shall affect the general principle of neutralization or the obligation of the High Contracting Parties under the present Treaty (art. 4).

The United States, by this time convinced of the feasibility of the Panama route, attempted to negotiate a treaty with Colombia for the right to construct a canal through its isthmian province. The failure of the Colombian Senate to ratify such an agreement, combined with a long-held Panamanian wish for separation from Colombia, resulted in a U.S.-backed revolt in Panama on November 3, 1903, complete with the presence of nine American warships to prevent Colombian troops from landing on the Isthmus.[82] The United States recognized the New Republic of Panama three days later, and on November 18 the two countries concluded the Hay-Bunau Varilla Treaty,[83] whereby the United States guaranteed Panama's independence (art. 1) and the latter country granted to the United States

> in perpetuity the use, occupation and control of a zone of land... for the construction, maintenance, operation, sanitation, and protection of said canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the canal to be constructed (art. 2).

The contents of the Treaty refer primarily to the legal relationship between the two countries as regard American rights within the Canal Zone. However, article 18 expressly incorporates the Hay-Pauncefote Treaty of 1901:

> The Canal, when constructed, and the entrance thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section I of Article Three of, and in conformity with all the stipulations of, the Treaty entered into by the Governments of the United States and Great Britain on November 18, 1901.

In addition, article 23 gives the United States "the right, at all times and in its discretion, to use its police and its land and naval forces, or to establish fortifications" if necessary "for the safety and protection of the Canal."

By the Spooner Act of June 18, 1902 the United States Congress had authorized the President to purchase the defunct French Company's rights and properties for $40 million.[84] These were purchased in May, 1904 and construction was begun immediately. The project was completed ten years later at a cost of some $400 million. The Canal was officially opened on August 15, 1914.[85]

Since 1903 there have been four additional treaties and a number of exchanges of notes modifying or supplementing parts of the Hay-Bunau Varilla Treaty. These changes, however, have all dealt with technical matters governing the rights and duties of both countries within the Canal Zone and along the borders. The legal instruments governing the status of the Canal have continued to be the original terms of the 1901

Hay-Pauncefote Treaty and the 1903 Hay-Bunau Varilla Treaty.

Deep-rooted Panamanian resentment against the Hay-Bunau Varilla Treaty culminated in serious rioting along the Canal Zone border in January, 1964, which in turn resulted in negotiations between the two countries to draft a new treaty. After 13 years of talks the United States and Panama signed two treaties on September 7, 1977, which were ratified by a Panamanian plebiscite (October, 1977)[86] and by the United States Senate (March-April, 1978).[87]

The Panama Canal Treaty[88] "terminate(s) the prior treaties pertaining to the Panama Canal" (Preamble) and provides for a gradual "Panamization" of the Canal and the former Canal Zone over the period of duration of the Treaty, which terminates on December 31, 1999. On that date, Panama will assume full control of the Canal and the former Canal Zone. The Treaty recognizes Panama as the "territorial sovereign" who in turn grants to the United States the rights to "regulate the transit of ships through the... Canal, and to manage, operate, maintain, improve, protect and defend" the waterway during the duration of the Treaty (arts. 1, 3). Both the United States and Panama "commit themselves to protect and defend" the Canal, though the United States, for the duration of the Treaty, will have the "primary responsibility" in this regard. For this purpose, the Treaty allows the United States "in normal times" to maintain its armed forces in the former Canal Zone at a level "not in excess" of the number present immediately prior to the date of entry into force of the Treaty[89] (art. 4).

By the terms of article 12, the two parties must agree on any plans for a sea-level canal through Panama, and the United States agrees not to negotiate with third states for rights to construct a canal through "any other route in the Western Hemisphere, except as the two parties may otherwise agree."

The new "Treaty on Neutrality,"[90] though entering into force simultaneously with the Panama Canal Treaty, is independent of the latter, unlike the Hay-Pauncefote Treaty of 1901 which was later incorporated into the Hay-Bunau Varilla Treaty of 1903. The Treaty on Neutrality is to remain in force after the termination of the Panama Canal Treaty in 1999. According to article 1

> The Republic of Panama declares that the Canal, as an international transit waterway, shall be permanently neutral in accordance with the regime established in this Treaty. The same regime of neutrality shall apply to any other international waterway that may be built either partially or wholly in the territory of the Republic of Panama (emphasis added).

The Canal is to "remain secure and open to peaceful transit" for the ships "of all nations on terms of entire equality," with "no discrimination against any nation, or its citizens or subjects, concerning the conditions or charges of transit or for any other reason." These are to apply "both in time of peace and in time of war" (art. 2). "Vessels of war and auxiliary vessels of all nations" are entitled "at all times" to transit the Canal,

> irrespective of their internal operation, means of propulsion, origin, destination, or armament, without being subjected, as a condition of transit, to inspection, search and surveillance. (art. 3).

These vessels need only certify that they have complied with "health, sanitation and quarantine regulations," and are entitled to refuse disclosure of their "internal operation, origin, armament, cargo, or destination."

The rules and regulations adopted for the passage of all ships are to be "just, equitable, and reasonable," and are limited to those "necessary for safe navigation and efficient, sanitary operation of the Canal" (art. 3).

While the Panama Canal Treaty provides for the defence of the Canal by both the United States and Panama with the maintenance of the present American troop level (art. 4), the Neutrality Treaty stipulates that after the termination of the Panama Canal Treaty, only Panama will "maintain military forces, defence sites, and military installations" (art. 5). Nevertheless, a continued American commitment for the guarantee of the Canal's neutrality beyond 1999 is also provided for by article 4:

> The United States of America and the Republic of Panama agree to maintain the regime of neutrality established in this Treaty, which shall be maintained in order that the Canal shall remain permanently neutral, notwithstanding the termination of any other treaties entered into by the two contracting parties.

At the time of ratification, the United States Senate attached a reservation to the Neutrality Treaty that would allow the United States to intervene militarily in Panama after the year 2000 if the security of the Canal should be threatened in any way. Upon ratifying the Panama Canal Treaty a month later, however, a reservation was attached to this second Treaty indicating that the earlier reservation to the Neutrality Treaty should not be interpreted as allowing the United States a right to intervene in the internal affairs of Panama or to direct any military action against the territorial integrity or political independence of that country. The reservations have been accepted by the Panamanian Government.[91]

The two countries also agree to sponsor a resolution in the Organization of American States opening the Treaty to the accession by all states of the world whereby these agree to "respect the regime of neutrality" provided for in the Neutrality Treaty, with the O.A.S. acting as depositary for the Treaty and its related instruments (art. 7).[92]

2. The Practice Under the Hay-Pauncefote And Hay-Bunau Varilla Treaties

During the years of the First World War when the United States was not a belligerent, warships of belligerents were allowed to use the Canal. A Presidential Proclamation of November 13, 1914,[93] however, required all belligerent warships or those vessels employed by a belligerent for purposes of war to receive permission from Canal Authorities and sign a declaration assuring that all rules and regulations would be faithfully observed before these would be allowed to enter the Canal. The United States entered the war on April 6, 1917, and on May 23 a further Presidential Proclamation[94] was issued prohibiting the passage of all enemy vessels:

> In the interest of the protection of the Canal while the United States is a belligerent no vessel of war, auxiliary vessel, or private vessel of an enemy of the United States or an ally of such enemy shall be allowed to use the Panama Canal nor the territorial waters of the Canal Zone for any purpose, save with the consent of the Canal Authorities and subject to such rules and regulations as they may prescribe. (Rule No. 15)

While the United States was still a neutral during the Second World War a Presidential Proclamation of Neutrality was issued on September 5, 1939[95] providing for the passage of belligerent warships[96] under conditions similar to those stipulated in the Proclamation of November 13, 1914. On the same day, the President also issued an Executive Order[97] prescribing regulations for "any war in which the United States is neutral":

> Whenever considered necessary, in the opinion of the Governor of the Panama Canal, to prevent damage or injury to vessels or to prevent damage or injury to the Canal or its appurtenances, or to secure observance of the rules, regulations, rights or obligations of the United States, the Canal Authorities may at any time as a condition precedent to transit of the Canal, inspect any vessel, belligerent or neutral, other than a public vessel, including its crew and cargo and, for and during the passage through the Canal, place armed guards thereon, and take full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by the Canal Authorities to go or remain on board thereof during such passage.

On the whole, during the period of American neutrality, the passage of belligerent vessels or neutral vessels carrying contraband of war was registered without incident.[98] However, before the entrance of the United States into the War a Regulation by the Acting Governor of the Canal Zone (and approved by the President) issued in July, 1941 declared the waters surrounding the Canal as "restricted" and ships were forbidden to enter them without receiving prior "instructions" from Canal Authorities.[99]

Upon the entrance of the United States into the War in December, 1941, the Presidential Proclamation of May 23, 1917[100] prohibiting the passage of all enemy vessels, still being in force, was applied.[101] In June, 1942 German U-boats entered the Atlantic approach to the Canal and sank an average of one ship a day for two weeks.[102]

During the Korean conflict President Truman issued an Executive Order[103] authorizing the Governor of the Canal Zone to take certain measures for safeguarding the Canal and its facilities. These included taking full or partial possession or control of any vessel when necessary to prevent damage or injury to any other vessel or facility, or to secure observance of the rights and obligations of the United States; the inspection and search of any vessel, and the placing of guards on any such vessel. During the duration of the Korean Conflict, no enemy merchant ships passed through the Canal.[104]

During the period following the Cuban Missile Crisis it was reported that Soviet and Cuban vessels were routinely searched prior to their transit and civilian police officers placed on board during their transit in an effort to prevent any act of sabotage or demolition that could imperil the safety of the Canal.[105] No such act has yet been attempted, and no interruption of canal operations by any hostile act has yet occurred.[106]

C. THE KIEL CANAL

1. Construction to 1919

The Kiel (formerly Kaiser Wilhelm) Canal was constructed by the German Empire in 1895 essentially as a military enterprise. Joining the Baltic to the North Sea, the 61 mile long canal was constructed for strategic rather than commercial reasons: to establish communication between the German naval arsenals of Wilhelmshaven and Kiel, and to permit German fleets access to the high seas by avoiding the Danish Straits.[107] The Canal, in contrast to the Suez and Panama, was not constructed or governed on the basis of any international agreement, and was never held out by Germany to be an international waterway. The German Government has always been its exclusive sovereign and administrator,[108] and the Canal was used as a harbor for the German fleet during World War One.[109]

The conclusion of the War put an end to the strictly internal status of the Canal. The Treaty of Versailles of 1919[110] included seven articles relating to the Kiel Canal. According to article 380

> The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality.

Article 381 stipulates that the "vessels of all powers" are to "be treated on a footing of perfect equality in the use of the Canal." In addition,

> No impediment shall be placed on the movement of persons or vessels other than those arising out of police, customs, sanitary, emigration or immigration regulations and those relating to the import and export of prohibited goods. Such regulations must be reasonable and uniform and must not unnecessarily impede traffic.

By the terms of article 385 Germany is "bound... to ensure the maintenance of good conditions of navigation." According to article 386, "any interested power," in the event of a violation of the respective articles (380-386) or a dispute as to their interpretation, can appeal "to the jurisdiction instituted for the purpose by the League of Nations," though Germany was also required to establish a local authority at Kiel to "deal with disputes in the first instance." This comprised the extent to which the Treaty of Versailles dealt with the legal status of the Canal, the remaining articles of the Kiel Section (382-384) dealing with tolls and customs matters.[111] The question of the international legal status of the Canal, if any, came before the Permanent Court of International Justice in 1923.

2. The Wimbledon Case

On March 21, 1921, during the Russo-Polish War, the British vessel Wimbledon, chartered by a French company and travelling to the Polish naval base in Danzig with a cargo of munitions, was refused entrance to the Kiel Canal by German authorities on the ground that the German Neutrality Orders of July 25 and 30, 1920, prohibited the transit of such cargo, Germany being a neutral during the Russo-Polish War. Germany also alleged that article 380 of the Treaty of Versailles was not an obstacle to the application of such orders.

The Principal Allied Powers (Poland intervening) sought a judgement from the Permanent Court of International Justice, which handed down a decision on August 17, 1923[112] against Germany (with three judges dissenting). The Court held that, according to the terms of article 380 of the Treaty of Versailles,

> The Canal has ceased to be an internal and national navigable waterway, the use of which by the vessels of states other than the riparian state is left entirely to the discretion of that state, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world. Under its new regime, the Kiel Canal must be open, on a footing of equality, to all vessels, without making any distinction between war vessels and vessels of commerce, but on one express condition, namely, that these vessels must belong to nations at peace with Germany.[113]

The Court then drew upon "the rules established with regard to the Suez and Panama Canals," which "though not the same in both cases,"

> demonstrate that the use of the great international waterways, whether by belligerent men-of-war, or by belligerent or neutral merchant ships carrying contraband, is not regarded as incompatible with the neutrality of the riparian sovereign.[114]

After examining the practice as to the Suez and Panama Canals, the Court determined that

> The precedents therefore afforded by the Suez and Panama Canals invalidate in advance the argument that Germany's neutrality would have necessarily been imperilled if her authorities had allowed the passage of the "Wimbledon" through the Kiel Canal, because that vessel was carrying contraband of war consigned to a state then engaged in an armed conflict. Moreover, they are merely illustrations of the general opinion according to which when an artifical waterway connecting two open seas has

> been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign state under whose jurisdiction the waters in question lie.[115] (emphasis added).

The reasoning used by the Court, and the impact of these pronouncements as regards the legal status of the three interoceanic canals is examined in a later section.[116]

3. The Practice After 1923

Passage through the Kiel Canal after the Wimbledon decision appears to have been generally unrestricted.[117] However, on November 14, 1936 Hitler's government announced that they

> no longer recognize as binding the provisions of the Versailles Treaty which concern the German waterways, nor the international acts which depend on those provisions.[118]

This was followed on January 16 of the following year by a regulation from the German Naval Command requiring all foreign warships and naval craft to obtain prior permission through diplomatic channels in order to transit the Canal.[119]

During the War, the Canal and its approaches became a major target of the allies. British bombers dropped parachute mines into the Canal and kept minefields around Kiel and Kiel Bay. During the course of the War the R.A.F. raided Kiel some 120 times and, together with American bombers, dropped some 26,000 tons of bombs along the Canal.[120]

In the 1950 Kiel Canal Collision Case[121] the German Supreme Court (British Zone) heard an action brought against the owners of a Danish vessel that collided with a Norwegian vessel in the Canal in which the defendants alleged that since the Canal is an international waterway, the collision took place on the high seas and, hence, outside the competence of the German Courts. The Court held that though article 380 of the Treaty of Versailles holds the Canal to be international, that same Treaty does not exclude the competence of German Courts to adjudicate collisions occurring therein. The Court also considered that

> Whether the Canal has remained an international waterway, as the appellants contend, seems doubtful because the German Note on German Waterways of November 14, 1936, put an end to internationalization, at least de facto, and this step did not meet with any serious resistance on the part of the signatory powers of the Treaty of Versailles.[122]

The Court, however, went on to state that "this question... need not be decided" since the appellants' argument that the internationalization of the Canal gave its waters a high seas character "is not justified."[123]

Whether the relevant provision of the Versailles Treaty still apply to the Canal as a result of the 1936 denunciation has remained a controversial matter, the key element cited by a number of publicists being the absence of effective protest to Germany's action by the signatories to that Treaty and the acquiescence by the world community as a whole.[124] Schwarzenberger hypothesizes that were an international court to consider the status of the Kiel Canal, it would have to settle at least five major issues: (1) whether the unilateral denunciation of part of a treaty is legal; (2) whether the effect of the Second World War between Germany and other parties to the Treaty terminated or suspended the whole or those parts of the Treaty which were of an essentially political character; (3) whether, as a result of the destruction of the German Reich in 1945, there ceased to exist continuity between the Third Reich and the Federal Republic of Germany; (4) whether, if the Treaty of Versailles or any part of it was terminated before 1945, it was later revived — if so, whether expressly or tacitly — by the Occupation Powers as the supreme authority of post-war Germany; and (5) an examination of the post-1945 practice of the Canal authorities and the reactions to this practice on the part of the maritime community.[125]

The position of the United States has been that the Treaty of Versailles was dispositive[126] in nature and that, therefore, rights granted under that Treaty are independent of the instrument creating them.[127] However, even were the Treaty to be recognized as being dispositive, only the signatories would immediately benefit from any rights granted therein. The existence of any actual third-party rights would depend on other considerations.[128]

In any event, until an authoritative body deals with the matter, one is inclined to agree with Schwarzenberger's view as to the relevance of the post-1945 practice. The Canal was opened for international navigation after the Second World War, and, despite the view of the German Supreme Court in the Kiel Canal Collision Case,[129] international traffic has made use of the Canal without incident since that time, thus reviving in fact the pre-1936 regime.[130]

REFERENCES TO CHAPTER I

1. C.W. Hallberg, The Suez Canal (New York, 1931), pp. 118, 138, 212.

2. "Act of Concession of the Viceroy of Egypt for the Construction and Operation of the Suez Maritime Canal and Appurtenances Between the Mediterranean Sea and the Red Sea," 55 British and Foreign State Papers, 1864-65, p. 970. English translation in The Suez Canal Problem, U.S. Dept. of State Publication No. 6392 (Washington, 1956), p. 1. (Hereinafter referred to as The Suez Problem.)

3. "Act of Concession of the Viceroy of Egypt, and Terms and Conditions for the Construction and Operation of the Suez Maritime Canal and Appurtenances," 55 British and Foreign State Papers, 1864-65, p. 976. English translation in The Suez Problem, p. 4.

4. The British were apparently of the belief that the benefits of such a canal would eventually impel the Viceroy to separate from Turkey, with Russia going to the Sultan's aid and setting off a chain of events in Europe with unfavorable consequences for England, Hallberg, supra note 1, at pp. 134-35; H.J. Schonfield, The Suez Canal in Peace and War (Coral Gables, Florida, 1969), pp. 32-33.

5. Hallberg, supra note 1, at p. 163.

6. "Convention Between the Viceroy of Egypt and the Compagnie Universelle du Canal Maritime de Suez," 56 British and Foreign State Papers, 1865-66, p. 277. English translation in The Suez Problem, p. 9.

7. "Firman of His Imperial Majesty the Sultan Confirming the Contract Signed February 22, 1866, Between the Viceroy of Egypt and Mr. de Lesseps, Concerning the Suez Canal," 56 British and Foreign State Papers, 1865-66, p. 294. English translation in Society of Comparative Legislation and International Law, The Suez Canal (London, 1956), p. 41.

8. Hallberg, supra note 1, at p. 214.

9. See infra, note 22.

10. B. Avram, The Evolution of the Suez Canal Status (Geneva, 1958), p. 31. In the Anglo-Iranian Oil Company Case (Jurisdiction) in 1952, The International Court of Justice concluded that the concession contract signed in 1933 between the Iranian Government and the Anglo-Iranian Oil Company was "nothing more than a concessionary contract between a government and a foreign corporation" that "does not regulate in any way the relations between the two governments" and which was not a "treaty by which the Iranian Government is bound vis-a-vis the United Kingdom Government," (1952), I.C.J. Rep., p. 93, at pp. 112-113.

11. P. De Visscher, "Les Aspects Juridiques Fondamentaux de la Question de Suez," 62 *Revue Général de Droit International Public*, Serie 3 (1958), p. 405. For an examination of the concept of unilateral declarations see *infra*, pp. 208-210.

12. J. Obieta, *The International Status of the Suez Canal*, 2nd. ed. (The Hague, 1970), pp. 51-65. See *infra*, pp. 191-197.

13. Hallberg, *supra* note 1, at pp. 281-83. See also Avram, *supra* note 10, at pp. 29-30.

14. Great Britain had advised both belligerents that any attempt to interfere or blockade the Canal would be regarded as a menace to India and a grave injury to world commerce, *Parliamentary Papers*, Russia No. 2 (1877), C. 1770, p. 1.

15. See *infra*, Ch. 3.

16. Obieta, *supra* note 12, at p. 54.

17. Hallberg, *supra* note 1, at pp. 143, 278-85; *Parliamentary Papers*, Egypt No. 1 (1877), C. 1766, p. 2. In 1878 the Institute of International Law adopted a resolution calling for the neutralization of the Canal, 10 *Revue de Droit International et de Legislation Comparée* (1878), p. 380.

18. Hallberg, *supra* note 1, at p. 283.

19. *Ib*., p. 285.

20. *Parliamentary Papers*, Egypt No. 6 (1885), C. 4339, p. 9.

21. *Ib*., Egypt No. 19 (1885), C. 4599.

22. 79 *British and Foreign State Papers* (1887-1888), p. 18. English translation in *The Suez Problem*, p. 16.

23. See e.g., Avram, *supra* note 10, at p. 33.

24. *Ib*., p. 34, n. 26.

25. Article 31 of the Vienna Convention considers a preamble to be part and parcel of the context of a treaty, text in 8 *International Legal Materials* (1969), p. 679.

26. Obieta, *supra* note 12, at p. 80.

27. H.L. Hoskins, "The Suez Canal in Time of War," 14 *Foreign Affairs* (1935-36), p. 98.

28. Hallberg, *supra* note 1, at pp. 300-01.

29. 109 *British and Foreign State Papers* (1915), pp. 431-33.

30. E.A. Whittuck, *International Canals*, Peace Handbooks, Vol. 23, No. 150, (London, 1920), p. 23.

31. Schonfield, *supra* note 4, at p. 69; Hallberg, *supra* note 1, at p. 335. For text of the British Proclamation see 108 *British and Foreign State Papers*, 1914, p. 185. During the Crimean War, the Ionian Islands, then an independent state under the protectorate of Great Britain, were not drawn into that war. See the *Case of the Ionian Ships* (1855) 2 Spinks, 219. However, in the case of *The Gutenfels*, involving a vessel seized as prize by the British off of Port Said in August, 1814, the Privy Council held that territory under military occupation of a belligerent becomes enemy territory as regards other belligerents, (1915) 1 B. and C.P.C. 102.

32. Hallberg, *supra* note 1, at pp. 341-42.

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34. E.g., *The Südmark* (1917) A.C. 620; *The Derfflinger* (1916) 2 B. and C.P.C. 43; *The Pindos* (1916) 2 A.C. 193.

35. *Parliamentary Papers*, Egypt, No. 1 (1922), Cmd. 1592, p. 29.

36. Treaty of Alliance Between His Majesty, in Respect of the United Kingdom, and His Majesty The King of Egypt, *Great Britain T.S.* No. 6 (1937).

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83. "Convention Between the United States and the Republic of Panama for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans" (Hay-Bunau Varilla Treaty), 96 British and Foreign State Papers, p. 553.

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85. Panama Canal Company, The Panama Canal Review, Special Supplement (Canal Zone, Jan., 1977), p. 2.

86. The Star and Herald, Panama, R.P., October 24, 1977, p. 1.

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92. This presents the rather anomalous situation of third-party rights conferred by means of accession to a bilateral treaty sponsored through a regional organization to non-members or to states outside of that region. It can be argued, however, that since the protocol of accession is in fact a part of the Neutrality Treaty, any third-parties will in effect be acceding to the Treaty itself as well as to the resolution sponsored in the O.A.S.

93. "Proclamation by the President of the United States of America Prescribing Rules and Regulations for the Use of the Panama Canal by Belligerent Vessels," 38 Stat., p. 2039, rep. in 9 American Journal of International Law, Supplement (1915), p. 167.

94. "Proclamation by the President of the United States of America Concerning Rules and Regulations for the Regulation, Management and Protection of the Panama Canal and the Maintenance of its Neutrality," 40 Stat., p. 1667, rep. in 11 American Journal of International Law, Supplement (1917), p. 164.

95. "General Proclamation of Neutrality of September 5, 1939," Proclamation No. 2348, Federal Register, Vol. 4 (1939), p. 3809.

96. One month later, on October 3, 1939, 21 American states signed a Declaration at Panama establishing a security and neutrality zone from which belligerent operations were to be excluded and which extended in some places up to 300 miles from the American Continent

(text in International Conference of American States, 1933-1940 (Washington, 1940), p. 334. The main belligerents, however, announced that they could not accept such an extensive neutrality zone, and they continued their war operations in the area despite protests by the American states, C. Fenwick, American Neutrality: Trial and Failure (New York, 1940), p. 129. The "Panama Declaration" appeared to have no effect on the neutrality proclamations dealing with the Canal.

97. Executive Order No. 8234, Sept. 5, 1939, ib., p. 3823.

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101. Whiteman, Digest, Vol. 3, pp. 1248-49. This and other Proclamations were incorporated into the Canal Zone Regulations, which are still in force, 35 C.F.R. 4.176 (revised as of Jan. 1, 1960).

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104. Letter from Office of the Canal Zone Governor to R.R. Baxter, dated Dec. 14, 1954, The Law of International Waterways (Cambridge, Mass., 1964), p. 221, n. 158.

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107. The Kiel Canal and Heligoland, Foreign Office Peace Handbook No. 41 (London, 1920), p. 5. See also C. Hadfield, The Canal Age (Newton Abbot, England, 1968), p. 169.

108. J.B. Moore, Digest of International Law, Vol. 3 (1906), p. 269.

109. G.H. Hackworth, Digest of International Law, Vol. 2 (1941), p. 827.

110. "Treaty of Peace Between the Allied and Associated Powers and Germany," signed at Versailles on June 28, 1919, 112 British and Foreign State Papers (1919), p. 1.

111. For a comparative examination of the treaty arrangements governing the Suez, Panama, and Kiel Canals, see infra, Ch. 2.

112. P.C.I.J. Series A, No. 1 (1923).

113. Ib., at p. 22.

114. Ib., at p. 25.

115. Ib., at p. 28.

116. See infra, pp. 224-226.

117. Baxter, supra note 104, at p. 172.

118. Royal Institute of International Affairs, Documents on International Affairs, 1936 (London, 1937), p. 282.

119. Ib., at p. 286.

120. K.F. Bean, Famous Waterways of the World (London, 1956), p. 127.

121. International Law Reports (1950), Vol. 17, Case No. 34, p. 133.

122. Ib., at p. 134.

123. Ib.

124. E.g., Brownlie, Principles of Public International Law (Oxford, 1973), p. 271; Oppenheim, International Law, Vol. 1, 8th ed., edited by H. Lauterpacht (London, 1955), p. 483; Baxter, supra note 104, at p. 89, n. 4; C. d'O. Farran, "The Right of Passage Through International Maritime Canals," Sudan Law Journal and Reports (1959), p. 142.

125. Schwarzenberger, International Law, Vol. 2 (London, 1968), pp. 558-61.

126. According to McNair, dispositive treaties involve " 'real' " rights or rights in rem, and treaties of this nature "create or transfer, or recognize the existence of certain permanent rights which thereupon acquire or retain an existence and validity independent of the treaties which created or transferred them," The Law of Treaties (Oxford, 1961), p. 256.

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128. See infra, Ch. 3.

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130. See D.P. O'Connell, International Law, Vol. 1 (London, 1965), p. 651; M. Sahovic, in M. Sørensen (ed.), Manual of Public International Law (London, 1968), p. 332; J.L. Brierly, The Law of Nations, 6th ed., edited by Sir H. Waldock (New York and Oxford, 1963), p. 236.

CHAPTER II

A COMPARISON OF THE CONVENTIONS REGULATING THE THREE WATERWAYS: THE EXISTENCE OF A "CANAL REGIME"

It has been suggested that the similar regimes of transit characterizing the Suez, Panama, and Kiel Canals, the respective grants to "all nations," and the express incorporation of the language of the Constantinople Convention into the Hay-Pauncefote Treaty have resulted in the emergence of a "common law" of interoceanic canals.[1] Be this as it may, however, it is convenient at this point to examine the conventions briefly on a comparative basis in order to determine the precise areas of difference.

1. The Suez Canal is governed by a multilateral treaty (1888)[2] between 9 powers, which was reaffirmed by a unilateral declaration (1957)[3] of the riparian state; the Panama Canal is governed by a bilateral treaty (1903)[4] which in turn expressly incorporates a further bilateral treaty (1901)[5] (the new arrangement involves two separate bilateral treaties[6]); the Kiel Canal is governed by a section of a multilateral treaty (1919)[7] imposed upon Germany by 27 states as a peace settlement[8] and denounced by that country in 1936,[9] though possibly not legally or effectively.
2. The Constantinople Convention provides for the accession by other powers (art. 16), though none have chosen to do so. The 1957 Declaration by the riparian reaffirming that Convention stipulates that the mentioned Declaration "constitutes an international instrument" to be "deposited and registered" with the United Nations (para. 10); neither the Hay-Pauncefote

nor Hay-Bunau Varilla Treaties governing the Panama Canal makes provision for accession by other parties[10] [the new Treaty on Neutrality provides for accession "by all states of the world" (art. 7)]; the Treaty of Versailles contains no provisions for accession by other states.

3. The Constantinople Convention provides for the freedom of passage of merchant and war vessels "in time of war as in time of peace" (art. 1); the Hay-Pauncefote Treaty is silent on the matter of passage in time of war[11] [the new Treaty on Neutrality provides for passage of merchant vessels, vessels of war, and auxiliary vessels "in time of peace and in time of war" (arts. 2, 3)]; The Treaty of Versailles provides for passage of merchant and war vessels of "nations at peace with Germany" (art. 1) with no express provision as to passage during wartime.[12]

4. The Constantinople Convention prohibits permanent foritifications (art. 11); they are permitted in the Panama Canal (Hay-Pauncefote Treaty: art. 3.2; Hay-Bunau Varilla Treaty: art. 23) [fortifications are also allowed under the New Panama Canal Treaty (art. 4) and Treaty on Neutrality (art. 5)]; the Treaty of Versailles is silent in this regard.

5. The Constantinople Convention (art. 4) and the Hay-Pauncefote Treaty (arts. 3.2, 3.6) forbid any act of war in the Canal or its approaches [the new Treaty on Neutrality also forbids such acts (art. 2)]; the Treaty of Versailles is silent on this, though it allows Germany to close the Canal to its enemies.

6. The Constantinople Convention allows the sovereign to take "measures" to "assure... the defense of Egypt and the maintenance of public order" (art. 10), but these measures "shall not interfere with the free use of the Canal" (art. 11);[13] the Hay-Bunau Varilla Treaty allows the United States "for the safety or protection of the Canal... the right at all times and in its discretion to use its police and its land and naval forces" (art. 23) [the new Panama Canal Treaty commits both Panama and the United States to "protect and defend" the Canal and to "act" in order to "meet the danger resulting from an armed attack or other actions which threaten the security" of the Canal or its passing vessels (art. 4)]; the Treaty of Versailles contains no clause on the defense of the Kiel Canal, but it permits exclusion of enemies of Germany.

7. The Constantinople Convention provides for freedom of passage through the Canal and prohibition of acts of war therein irrespective of the state of belligerency of the sovereign (art. 4); no such stipulation is included in either the Hay-Pauncefote or Hay-Bunau Varilla Treaties (or in either of the two new treaties); the Treaty of Versailles allows passage only to "nations at peace with Germany" (art. 1).

The Physical Differences

In comparing the legal bases and state practice as regards the three interoceanic canals it is not unimportant to bear in mind some physical differences which may in some cases account for variations in their regimes, either in their treaty arrangements or practice. The Suez Canal is a sea-level canal, not unlike a river in appearance which, while still vulnerable to attack, contains few complex structures or mechanisms which if destroyed could render the Canal inoperable for a considerable period of time. Despite repeated bombings, machine-gunnings and parachute minings by German and Italian aircraft during World War Two, the Canal was rendered inoperable for only three days, that being in August, 1944 when a tanker was sunk in the channel.[14] The Panama Canal, however, is a lock canal where, due to the elevation of the Continental Divide, vessels must be lifted and lowered across the Isthmus by lock chambers situated at both termini and near the center.[15] A study commissioned by the United States Government in 1970 estimated that the demolition of a shipload of explosives in the locks could render those locks inoperable for at least two years.[16]

The Kiel Canal is also a lock canal, with four sets situated side by side at each entrance. These were made necessary both by the elevation of the land and by variations in the water-level at the entrances due to tides.[17]

While both canals have been successfully defended by their sovereigns, modern warfare has made their defence considerably more difficult. The United States Department of Defence has estimated that it would require up to 200,000 troops to adequately defend the Panama Canal against a conventional attack from Panama with outside support, and that continuous guerilla activity could conceivably render the Canal indefensible.[18]

The Existence of a "Canal Regime"

Despite differences in some aspects of their constitutional foundation and in their physical characteristics, there are more fundamental similarities: the three canals were artificially constructed and are administered by the governments of sovereign states. Functionally, they all provide access between two stretches of open sea. Moreover, the three waterways — especially Suez and Panama — are important thoroughfares for international maritime communication and are of strategic significance.

Constitutionally, the three canals are governed by separate treaties to which the respective sovereigns have been a party, but which opened each waterway to free navigation by the merchant and war vessels of "all nations" in time of peace on a non-discriminatory basis. The express incorporation of the Constantinople Convention of 1888 into the Hay-Pauncefote Treaty of 1901 is further indication of their basic constitutional similarity. The Permanent Court of Justice in the Wimbledon Case[19] recognized this in basing its decision as to the legal status of the Kiel Canal on an examination of the constitutional nature and practice of the Suez and Panama Canals.[20] Moreover, state practice as to the three canals has shown a remarkable degree of uniformity and consistency.

Hence, there is room for the argument that on the basis of their similar constitutional foundations, state practice, and adjudication, interoceanic canals are governed by an enlarging common body of law and that they thus have assumed a status of their own — however imperfect — in international law.

REFERENCES TO CHAPTER II

1. See R.R. Baxter, The Law of International Waterways (Cambridge, Mass., 1964), pp. 42, 185; J.A. Obieta, The International Status of the Suez Canal, 2nd ed. (The Hague, 1970), p. 41.

2. "Convention Between Great Britain, Austria-Hungary, France, Germany, Italy, The Netherlands, Russia, Spain, and Turkey, Respecting the Free Navigation of the Suez Maritime Canal" (Constantinople Convention), October 29, 1888, 79 British and Foreign State Papers, p. 18.

3. Egyptian Declaration of April 24, 1957 annexed to letter to the Secretary-General of the United Nations from the Egyptian Minister of Foreign Affairs, U.N. Doc. No. A/3576, S/3818, 1957.

4. "Convention Between the United States and the Republic of Panama for the Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans" (Hay-Bunau Varilla Treaty), Nov. 18, 1903, 96 British and Foreign State Papers, p. 553.

5. "Treaty Between the United States and Great Britain to Facilitate the Construction of a Ship Canal" (Hay-Pauncefote Treaty), Nov. 18, 1901, 94 British and Foreign State Papers, p. 473.

6. "Panama Canal Treaty," Sept. 7, 1977, rep. in 16 International Legal Materials (1977), p. 1022; "Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal," Sept. 7, 1977, ib., p. 1040. The two treaties have been ratified by a Panamanian plebiscite, and by the United States Senate, supra Ch. I, p. 166.

7. "Treaty of Peace Between the Allied and Associated Powers and Germany" (Treaty of Versailles), June 28, 1919, 112 British and Foreign State Papers, p. 1.

8. See supra, Ch. I, note 110.

9. Royal Institute of International Affairs, Documents on International Affairs, 1936 (London, 1937), p. 282. See supra, p. 172.

10. The first draft of the Hay-Pauncefote Treaty contained an accession clause, but was rejected by the U.S. Senate, Diplomatic History of the Panama Canal, Senate Document No. 474, 63rd. Cong., 2nd. Sess. (1914), pp. 61-68.

11. The first draft of the Hay-Pauncefote Treaty rejected by the U.S. Senate contained the words "in time of war as in time of peace," ib., p. 64. The omission of wartime passage, however, cannot be construed as indicating that the Canal is not to be open during third-party wars, since this would render the neutralization provisions meaningless. See E.A. Whittuck, International Canals, Peace Handbooks, Vol. 23, No. 150 (London, 1920), p. 55; Baxter, supra note 1, at p. 217.

12. But see the Wimbledon Case, P.C.I.J., Series A, No. 1 (1923), supra, pp. 170-72; infra, pp. 224-26.

13. It would be reasonable to assume that under certain conditions the defense of Egypt or the maintenance of public order cannot be effected without interfering with the free use of the Canal.

14. R.E.B. Duff, 100 Years of the Suez Canal (Brighton, England, 1969), p. 133. See also H.J. Schonfield, The Suez Canal in Peace and War (Coral Gables, Florida, 1969), pp. 32-33.

15. D. McCullough, The Path Between the Seas (New York, 1977), p. 101.

16. Atlantic-Pacific Interoceanic Canal Study Commission, Interoceanic Canal Studies, 1970 (Washington, D.C., Dec. 1, 1970), p. 9.

17. The Kiel Canal and Heligoland, Foreign Office Peace Handbook No. 41 (London, 1920), pp. 6-7.

18. Congressional Record, 95th Congress, 1st. Session, Vol. 123, No. 86, May 19, 1977, p. 5.

19. P.C.I.J., Series A, No. 1 (1923).

20. Ib., at pp. 25-29.

CHAPTER III

THE DETERMINANTS OF PASSAGE

Despite differences in their respective conventions, the practice of the Suez, Panama, and Kiel Canals has shown a marked degree of consistency. Freedom of passage for both merchant and war vessels in times of unqualified peace has been virtually untrammeled,[1] while passage to enemy vessels — whether merchantships or men-of-war — has generally been denied. The questions that must be asked at this point are the following:

1. Does the international community have any legal and enforceable rights of passage through these waterways either in time of peace or in time of war?
2. On what legal foundations might such rights be based?
3. How might such rights co-exist with those of the riparian states?

These are best answered by examining the various legal concepts that at times have been held out as creating such rights.

A. THE RULE PACTA TERTIIS NEC NOCENT NEC PROSUNT AND THE CREATION OF THIRD-PARTY RIGHTS: THE STIPULATION POUR AUTRUI

The respective conventions governing the three interoceanic canals all contain grants of free passage to the merchant and war vessels of all the nations of the world, though not under identical conditions.[2] While it is clear that each grant creates rights in favour of the signatories to each convention, to what extent can these stipulations create enforceable rights in favour of non-signatories?

The traditional view of international law, as expressed in the general rule of pacta tertiis nec nocent nec prosunt, has been to recognize rights and duties only as between parties to a treaty. Some question exists, however, as to whether third-states can acquire rights by consenting to a clear *stipulation pour autrui* contained in treaties such as those governing the Suez, Panama, and Kiel Canals. On the whole, however, the doctrine has not met with an enthusiastic reception in international law. McNair is skeptical as to the existence of such an enforceable right, and concurs with the view taken by Rousseau who, after examining the *stipulation pour autrui* in a number of international decisions and incidents, doubts that a legally enforceable stipulation in favour of third states is recognized as a general principle of international law.[3]

The Permanent Court was not receptive to the doctrine in the *Case Concerning Certain German Interests in Polish Upper Silesia*[4] or the *Chorzow Factory Case*.[5] However, the same Court, in the 1932 *Case of the Free Zones of Upper Savoy and the District of Gex*[6] stated:

> It cannot be lightly presumed that stipulations favourable to a third state have been adopted with the object of creating an actual right in its favour. *There is, however, nothing to prevent the will of sovereign states from having this object and this effect*. The question of the existence of a right acquired under an instrument drawn between other states is therefore one to be decided in each particular case; it must be ascertained whether the states which have stipulated in favour of a third state *meant to create for that state an actual right which the latter has accepted as such* (emphasis added).[7]

The 1969 Vienna Convention on the Law of Treaties[8] confirms this view, but with a presumption as to the existence of the assent of the third state:

> A *right* arises for a third state from a provision of a treaty if the parties to the treaty *intend the provision to accord that right* either to the third state, or to a group of states to which it belongs, *or to*

> all states, and the third state thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides (art. 36, emphasis added).

The question, then, is whether in the case of the three inter-oceanic canals, the respective signatories intended to create a right for the world community or merely to grant a privilege or a benefit. It is interesting to note that the word "right" does not appear in the wording of any of the respective conventions. The Harvard Research, in its draft on the Law of Treaties,[9] while recognizing that a treaty might contain a valid stipulation in favour of a third state, excluded from such a category those treaties "which, without the parties so intending, do incidentally secure advantages or benefits to third states."[10] The draftsmen of the Harvard Research held article 380 of the Treaty of Versailles in this latter category.[11]

When examining the respective conventions, it is difficult to find a clear intention to create such a legal right. Since the Constantinople Convention contains an accession clause (art. 16), it can be argued that the formal acceptance of such a clause constituted the only means by which the original signatories intended third states to receive the benefits of that Convention.

On the same basis, it can be argued that since the Hay-Pauncefote Treaty of 1901, which was expressly patterned after the Constantinople Convention, did not include an accession clause, the original parties did not intend to grant any rights to third parties, even by their formal accession. This is borne out by the fact that the first text of the Hay-Pauncefote Treaty did contain an accession clause patterned after article 16 of the Constantinople Convention. This was rejected by the United States Senate, however, precisely because it did not wish that country to be bound to third states.[12] This has in fact been the American position since that time.[13]

In the case of Kiel, that Canal was originally constructed in 1895 by the German Empire as an internal waterway for strategic purposes.[14] It was not until 1919 that this position changed as a result of a peace treaty imposed upon Germany by 27 powers, and which was denounced by Hitler's government in 1936[15] with no express protest on the part of the majority of the signatories to the Treaty or by the international community as a whole.[16] As a result of that denunciation the German Supreme Court (British Zone) in the 1950 Kiel Canal Collision Case questioned the existence of the Canal's international status.[17] These events would appear to show little convincing evidence of any clear intention by the signatories to the Treaty of Versailles to create any enforceable third-party rights, and certainly no such intention on the part of the riparian state. In commenting on the World Court's efforts in the Wimbledon Case[18] to determine the intention of the parties to the Treaty of Versailles by drawing upon "precedents" and "illustrations" to arrive at the conclusion that the three canals were "permanently dedicated to the use of the whole world" and thus could be "assimilated to natural straits,"[19] Schwarzenberger considers that the Court "came very near to straying from the path of legal rectitude."[20] In his view the object of the doctrine of assimilation was

> another way of attempting to give treaties an automatic effect in relation to third states which, in accordance with the rules underlying the fundamental principles of international law, they cannot claim.[21]

In discussing the effects of treaties on third states Oppenheim makes an express reference to the Hay-Pauncefote and Hay-Bunau Varilla Treaties in order to determine whether the grants contained therein created any third-party rights. He answers this in the negative and explains:

> It has been asserted that if a treaty stipulates for a right for third states, and they make use of such a right, they thereby acquire a legal right for themselves so that the treaty cannot be abrogated without their consent. It is argued that, having accepted a right which was offered to them, they cannot be deprived of it against their will. This would be so if the contracting parties really intended to offer such a right to third states. But there is room for the view that if the contracting parties had intended to do so, they probably would have embodied a stipulation in the treaty according to which the third parties concerned could accede to it.[22]

It is also important to consider the prevailing legal norms of the times during which these conventions were signed. Referring specifically to the Constantinople Convention of 1888, Farran states:

> One must bear in mind... that the Convention was signed in the Nineteenth Century; trends by which a multilateral treaty may have effect on third parties are very recent. What matters is the intention of the parties: a group of fifty nations may have in 1945 intended to create an organization having rights as against even non-signatory states: but in 1888 it was unthinkable according to the then contemporary modes of thought that the rule *pacta tertiis*... should be disregarded.[23]

The subsequent practice of the riparian, signatory, and other user states need also be taken into account. The practice of the Panama Canal is the most exemplary, in having provided virtually untrammeled transit to merchant and war-vessels in time of peace or when the United States was a neutral. But it can be argued that the provisions of the Hay-Pauncefote Treaty were complied with merely because it was equally beneficial to the riparian state and provided no threat to its security, and not because the United States felt any *legal* obligation toward the international community. While neutral during World War Two that country felt no hesitation in imposing conditions upon the transit of all vessels for reasons of security, including inspection and the placing of armed guards during passage,[24] and in both World Wars belligerent warships were required to receive permission prior to transit.[25]

Though the Constantinople Convention provides for freedom of passage through the Suez Canal for merchant and war vessels in time of peace or war, even for enemy vessels, the sovereign has in fact consistently allowed untrammeled transit only during time of peace. Despite Egypt's solemn reaffirmation in 1957[26] of the Constantinople Convention, that country continued to violate its terms.[27] This attitude, combined with the mild reaction on the part of the signatories as well as by the international community as a whole[28] does not assist in providing clear evidence of an intention to create third-party rights.

The non-reaction by both signatory and non-signatory states to the denunciation in 1936 of the Kiel Canal provisions of the Treaty of Versailles,[29] would lead to the same conclusion in the case of that waterway.

It can also be argued that the signatory states had little reason to voluntarily bind themselves to third states by conferring on them enforceable rights which international law did not require the signatories to confer and which impose far more liabilities on the latter than advantages.

On the basis of the presumption of the general rule pacta tertiis nec nocent nec prosunt,[30] it would appear that the burden is on third parties to prove that a stipulation pour autri in each separate case has created a legal and enforceable right of passage in their favour on the basis of the intention of the signatories. Thus far they have not been successful in so doing.

The preferable view, stated as early as 1917 by Roxburgh,[31] is that such stipulations do not _ipso facto_ create international law, but rather may institute a practice which in time can become a rule of customary law.[32] Whether this has in fact occurred in the case of interoceanic canals is examined in the following section.

B. CREATION OF A LEGAL RIGHT BY THE OPERATION OF CUSTOM

A further manner by which third-party rights may be acquired is through the operation of custom. Article 38 of the Vienna Convention on the Law of Treaties states:

> Nothing in Articles 34 to 37 (dealing with the rights and obligations of third states) precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such.

The decisive element here is the fact that a right derived from custom is independent of the nature of the treaty or of its intentions. Hence, regardless of whether the conventions regulating the three interoceanic canals were at the time of their signing creative of third-party rights, after a certain period of time has elapsed a continuous and consistent practice as to freedom of passage could evolve into a rule of customary international law in favour of third states that would then be binding on the riparian states. While the passage of time is an important element in determining the consistency and uniformity of a practice, the time element is itself not the decisive criterion.[33] Article 38 of the Statute of the International Court of Justice stipulates as one of the sources of international law "international custom as evidence of a general practice accepted as law." Hence, there are two decisive elements: 1) a general practice by states, and 2) the acceptance of this general practice as law.

In the case of the first criterion, while a general practice normally requires a practice emerging from the community of states as a whole or within a given region, the practice of a limited number of states can be alluded to in cases involving local customs or bilateral relations, as occurred in the case concerning a Right of Passage Over Indian Territory[34] where the International Court of Justice conceded that the relation of two states could result in the establishment of a local custom.[35] Whether this could be the case with interoceanic canals, is another matter.

It can be argued that when the Permanent Court in the Wimbledon Case[36] drew upon the practice of the Suez and Panama Canals in determining that the passage of warships did not compromise the neutrality of the riparian states, it was in fact considering that limited practice as a general rule. This is the view, for example, of Brownlie who, nevertheless, considers that such a general rule was "deduced, perhaps too readily" by the Court.[37] It can also be argued, however, that the Court was not deducing a general rule of customary international law. Rather, it was looking upon the practice of Suez and Panama as mere "examples" that "demonstrate" that the respective canal states did not regard the passage of warships as incompatible with their neutrality.[38] In fact, the Court later goes on to consider the practice of the Suez and Panama Canals as "precedents" which are "merely illustrations" of a "general opinion" regarding that dedication of these waterways to international navigation, resulting in their assimilation to natural straits in the sense that the passage of belligerent warships does not compromise the neutrality of the riparian.[39] Aside from the questionable nature of these "precedents" and "illustrations,"[40] the Court appeared to be relying more on the concept of dedication than on custom. The former concept, examined in a later section,[41] is itself a controversial one and not dependent on custom.

The second criterion, the acceptance of the general practice as law, refers to the psychological element of opinio juris sive necessitatis, implying a sense of legal obligation by one party to allow the exercise of an act by another.[42] Though some writers have denied the necessity of this element,[43] it appears to be well grounded in the opinion of the majority of publicists.[44] The purpose of this element is to differentiate between a practice which, though perhaps continuous, consistent, and general, is motivated by either courtesy, convenience, comity, or fairness rather than by a sense of legal obligation.[45] In the few cases where this element has been referred to, the Courts have been strict in requiring proof of opinio juris.[46] In the Lotus Case,[47] the Permanent Court said:

> Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances alleged ... it would merely show that states have often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that states have been conscious of having such a duty.[48]

In the Asylum Case,[49] the International Court of Justice elaborated upon the requirements of custom as deduced from article 38 of the Statute:

> The party which relies on custom must prove that this custom is established in such a manner that it has become binding on the other party... that the rule invoked... is in accordance with a constant and uniform practice by the states in question, and that this duty is an expression of a right appertaining to the state granting asylum and a duty incumbent on the territorial state.[50]

More recently, the matter came before the same Court in the North Sea Continental Shelf Cases[51] and the Fisheries Jurisdiction Case.[52]

What is evident here is the fact that while opinio juris has been referred to as a psychological or mental element, the Courts' attitude and the modern tendency in general has been to examine not the state's psychological convictions or mental state as such, but the facts proved, and to infer opinio juris from the actual behaviour of states. Hence, it is necessary to look both at a state's practice and the reaction (by acquiescence or protest) of other states to that practice.[53] In the case at hand this would mean that in determining whether the practice as to the three interoceanic canals amounts to a rule of customary law, the riparian states must have shown in their practice that they acted out of a recognition or belief that their practice was binding on them in law and that the user states were in the exercise of a legal right which they (the user states) recognized as being such. Though sufficient time would have elapsed in the case of these waterways to consider the formation of a rule of customary law, strict proof of opinio juris is not convincingly evident. Though it could be argued in the case of Egypt that the 1957 Declaration, for example, must have been indicative of some sense of legal duty, the fact that its terms were promptly and consistently violated would appear to demonstrate that any such sense of legal obligation was no more than a superficial one. Only in the case of the Panama Canal have the terms of the respective convention been adhered to (passage of merchant vessels and warships in time of peace) and this, as was suggested earlier,[54] cannot convincingly be construed as arising out of any sense of legal obligation, since that practice has been as convenient and necessary to the riparian as to the users. During those periods when the security of the Canal may have been endangered, the United States did not hesitate in imposing the necessary restrictive measures, including, while still a neutral during World War Two, the right to inspect all vessels and place guards during their transit.[55] Hence, there being little to suggest that the United States ever jeopardized — or acted against — its interests in favour of the world community, it would appear difficult indeed to prove that its practice was the result of a sense of legal duty rather than due to mere convenience.

In the case of the Kiel Canal, the denunciation by the riparian of the relevant provisions of the Treaty of Versailles in 1936, the non-reaction by the international community to that act, and the questioning in 1950 by the German Supreme Court (British Zone)[56] of the international status of that waterway as a result of that denunciation, would hardly allow a credible argument as to the existence of *opinio juris*.

C. PASSAGE AS A SERVITUDE

The concept of servitudes has been one of the more controversial in international law. Its existence in — and applicability to — international law has been endorsed by such publicists as Oppenheim,[57] Lauterpacht,[58] and O'Connell,[59] and denied by the likes of Brierly,[60] McNair,[61] Brownlie,[62] and Schwarzenberger.[63] F.A. Valí, one of the foremost authorities on the subject, defines a servitude as

> a permanent (durable) legal relationship established by a particular international treaty whereby one state or a certain number of states, is or are entitled to exercise rights within part of the whole of the territory of another state, for a special purpose or interest relating to the territory in question.[64]

Involving as it does a limitation of state sovereignty in favour of other states, the concept has had a special attraction to the question of passage through interoceanic canals. H.D. Reid, a less recent authority on the subject, refers to rights of passage through these waterways as "interoceanic transit servitudes,"[65] and Fenwick considers that the Panama and Suez Canals have been subjected by their riparian states to

> a sort of self-imposed servitude, in consequence of which the states of the world at large enjoy a privilege closely approximating to a legal right, of innocent use, subject to definite conditions laid down in a formal international document.[66]

To O'Connell, what is important is not the type of instrument opening the waterway, but the sovereign's own consent to open the canal and the practice of all nations accepting the status. Hence,

> what is instituted is not a contract relationship, but a servitude, the incidents of which are manifested slowly through actual experience.[67]

Akehurst also appears receptive to the suggestion that the concept be applied to the Panama and Suez Canals

> so as to give a right of navigation to all the states of the world, regardless of whether or not they are parties to the treaty concerned.[68]

It is interesting that Vali, while advocating the application of servitudes to international law, nevertheless does not consider the concept applicable to interoceanic canals. In his view, international servitudes are "particular and localized restrictions of territorial sovereignty," while rights of transit through interoceanic canals are "localized," but "general restrictions of territorial sovereignty."[69] However, according to a review of the literature by Whiteman,

> Writers who favor state servitudes and who treat of the Suez Canal and the Panama Canal, regard them as constituting servitudes, even in favor of third parties.[70]

Borrowed as it was from private law, however, the concept has not enjoyed as satisfactory a transition to international law as some would have it. The servitude in Roman law was a right _in rem_, against the whole world; that is, a _real_ right exercisable not only against a particular owner, but against any successors to him in title. Hence, the benefit would have to "run with the land" regardless of whom the sovereign affected might be. In international law, then, the right would have to survive a change in the sovereignty of either of the two states concerned. According to Brierly, "there is no real evidence that any such right exists in the international system."[71]

While the courts have not tacitly denied the existence of servitudes in international law, they have been cautious in endorsing the concept.[72] In the 1910 _North Atlantic Coast Fisheries Arbitration_,[73] the United States argued that a treaty concluded with Great Britain in 1818 had created a servitude in favour of the former with regard to fishery rights off the coast of Newfoundland. The Permanent Court of Arbitration rejected the contention, finding the concept of servitudes

> little suited to the principle of sovereignty which prevails in states under a system of constitutional government... and to the present international relations of sovereign states, (and which) has found little, if any, support from modern publicists.[74]

In the 1923 _Wimbledon Case_,[75] it was argued before the Permanent Court of International Justice that the right of passage through the Kiel Canal amounted to a state servitude, but the majority of the Court did not agree, stating that

> The Court is not called upon to take a definite attitude with regard to the question, which is moreover of a very controversial nature, whether in the

> domain of international law there really exist servitudes analogous to the servitudes of private law.[76]

Even were the concept fully accepted in international law there is still disagreement as to whether the term "servitude" is to apply only to bilateral arrangements and to the successors in title of the original treaty or whether the benefits can apply to third states as well,[77] a debate that only leads back — in the case of interoceanic canals — to the question whether the respective treaty arrangements created third party rights in the first place.[78] In any event, a doctrine purporting to impose a right, permanently attached to the soil and independent of the treaty itself, upon sovereign states who had no intention of creating such far-reaching commitments will not easily find acceptance in the modern international system. Perhaps the distasteful aspects of the concept as it applies to international law are best expressed by Schwarzenberger:

> To assert a capacity to make objective law or create duties of an absolute character is one thing. It is another to employ terminology which is borrowed from private law to suggest that international law enables individual states, or any number of them, to pose as law-makers for others against their will. The notions of state servitudes and absolute rights are misleading in that they tend to convey that some subjects of international law are entitled to dispose of the freedom of other sovereign states.[79]

D. PASSAGE RIGHTS AS A RESULT OF DEDICATION AND RELIANCE

Perhaps the most prevalent theory upon which passage rights to non-signatories have been based has been that of the so-called dedication of these waterways by their respective sovereigns to the use of the world. It will be remembered that in the Wimbledon Case[80] the Permanent Court spoke of the Suez and Panama Canals as

> merely illustrations of the general opinion according to which when an artifical waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign state under whose jurisdiction the waters in question lie.[81]

An important consideration of this theory is that, like custom, it is not dependent on the nature of the instrument carrying the dedication, which could take the form of a unilateral declaration or a treaty. What is decisive is the fact that it speaks to the entire world as the beneficiary of the right.[82] Hence, the Permanent Court laid stress less on whether article 380 of the Treaty of Versailles conferred a right and more on whether it created objective law and produced effects erga omnes.

McNair finds the concept applicable to the Suez and Panama Canals, but primarily by virtue of the "inherent purpose of the waterways, namely to facilitate communications between states," so that

> upon the occasion of the opening of such a waterway there occurs a legal process recognized by the private law of some countries, namely a dedication orbi et urbi of some natural advantages or facilities, with the intention that the securing of these facilities for the public use is affected by their becoming a part of the public law of the world.[83]

Baxter endorses this as the "preferable theory concerning the rights of non-signatories";[84] however, he adds an important condition for the creation of enforceable rights under this theory: that of reliance:

> A state may, in whole or in part, dedicate a waterway to international use, which dedication, if relied upon, creates legally enforceable rights in favor of the shipping of the international community.[85]

The same author considers this element as the basis for the legal regime of canals:

> The law of canals acquires its force with respect to a particular canal only if that waterway has been dedicated to international usage — a dedication which has in the practice of states taken the form of treaties constituting a grant of rights to the other contracting parties and to third states as well.[86]

In Baxter's view, the international use of the waterway creates a reliance on shipping routes and on established patterns of maritime communication which, if disrupted, causes great harm to international navigation, thus resulting in an international wrong.[87]

The application of this concept to interoceanic canals is tempting. Based as it is on the assumption of a lofty bestowment of the "great international waterways" to world use, it pretends to go beyond mere contractual commitments in order to impose an obligation on a sovereign "for the good of mankind." There can certainly be no denying that these canals provide a vital service to international maritime communication, and that navigation has come to rely on their benefit. On this basis alone, however, it presupposes an intention on the part of the sovereign or signatories to dedicate such a benefit to the world without taking into consideration the riparian's own interests. Any presumption that a state will willingly renounce a right or assume such an awesome duty on the basis of the noble purpose of the venture would appear to be politically naïve and legally untenable. The doctrine is also vague as to the reciprocal responsibilities and duties of user states. Since the relationship established by the dedication is not dependent on the instrument in which the dedication is contained, to what extent does the state accepting the benefit assume the burdens and responsibilities defined in that instrument and accepted by the signatories?[88]

The question of reliance is also vague, since there would be difficulty in separating those nations which merely use the waterway from those who actually rely on it. In Baxter's view, since the Panama, Suez, and Kiel Canals were, "subject to some exceptions, thrown open to use by the ships of all nations," a reliance "by the shipping community in general" is sufficient to establish a right even for those states that have never used the canal before.[89]

The major weakness of the concept lies in the fact that in the end it invariably leads back to the question of determining the true intent of the granting state and the extent to which such treaties confer enforceable rights on third states. A rather extensive study of the concept of dedication as it might apply to the three canals was carried out by Farran in 1959,[90] who concludes that though both the Suez and Panama Canals were "dedicated," it is "by no means clear that any right of passage could be, or has been, created by those treaties in favour of non-signatory states."[91] This conclusion was arrived at after considering the maxim pacta tertiis and inquiring at length into the intention of the respective parties.

Neither can the theory be divorced from the operation of customary law. Baxter himself points out that the reliance of states on the use of these waterways is "the consequence of the hardening into customary international law of usages" following the dedication.[92] Hence, since reliance is the result of custom, all the elements of the latter[93] would have to be proven before reliance can be said to have taken place and any rights created.

Even more than the notion of servitudes, the theory of dedication would allow individual states to make law binding on — and against the will of — other states for the sake of a greater good. The assumption is made that the need of the international community can be imposed upon the principle of territorial sovereignty. While attractive on the surface, such a theory, introduced within the competitive sovereign-state system, flies in the face of reality.

E. PASSAGE RIGHTS AS A RESULT OF A UNILATERAL DECLARATION

The theory of dedication closely resembles the act of unilateral declaration, whereby a state demonstrates an intention to accept obligations vis-a-vis other states by a public declaration which is not dependent on reciprocal undertakings on the part of the other states.[94] Such declarations may be written or oral,[95] or contained in a bilateral agreement.[96] Unlike the dedication, however, the binding unilateral declaration usually contains a clear intent to confer a right on other states rather than merely a benefit. Moreover, instead of the element of reliance, the declaration relies on acceptance by other states as a condition for validity. According to Obieta,

> the declaration itself would be in the nature of a promise to allow freedom of navigation through the canal to all nations, a promise which would necessarily imply a partial renunciation of sovereignty over the canal, in so far as it would not be open to the sovereign any more to restrict navigation through the canal.[97]

In his view, the unilateral declaration in the case of the Suez Canal originated with the Concessions of 1854 and 1856, was affirmed by the Constantinople Convention of 1888, and re-affirmed by the Egyptian Declaration of 1957.[98] Such a declaration, argues Obieta, creates an "international regime" or "regime of internationality" which imposes upon the sovereign the requirement only to allow freedom of passage to merchant vessels in time of peace.[99]

Though writers on international law have differed as to the binding power of the different forms of unilateral acts[100] and the point at which they could become binding (i.e., upon their pronouncement, upon receipt by the other party, or upon acceptance by the latter[101]), there appears to be general agreement that a unilateral declaration clearly indicating an intention to be bound, if followed by acceptance, can lead to the creation of a legal right.[102] The form which the acceptance takes appears not to be decisive, as long as the will to accept is manifest. Hence, according to Obieta "the mere use of the canal by the vessels of some nation would be sufficient indication of the wish of that nation to accept the international regime."[103]

It would appear that the Egyptian Declaration of 1957 meets the minimum requirements needed to be considered a binding unilateral act.[104] It reaffirms the terms and spirit of the Constantinople Convention and of "the rights and obligations arising therefrom" (art. 1), and commits Egypt to "maintain free and uninterrupted navigation for all nations" (art. 3). Moreover, the Declaration is held by article 10 to constitute "an international instrument" to be deposited and registered with the Secretariat of the United Nations. These are convincing elements to the effect that it was Egypt's intention to assume a binding obligation. The practice since 1957, however, was a disappointment, despite the existence of the Arab-Israeli dispute which would condone the exercise of certain billigerent rights.[105] Israeli vessels were consistently denied transit, Israeli-bound cargo on neutral vessels was confiscated, and vessels previously trading with Israel were blacklisted. There were also inordinate delays and the harassment of crews.[106] The fact that the rest of the world's vessels transited freely during this time is a poor argument in favour of the validity of the half-observed Declaration, though admittedly the obscure status of the Arab-Israeli dispute since 1957 and the lengthy closure of the Canal after the 1967 war provide a complicated background for such an assessment, especially from the point of view of Egypt. As for the international community, however, the lack of any express acceptance of the Declaration and the mild reaction to its violations[107] does not assist in providing clear evidence that the nations of the world viewed the Declaration as a legally binding instrument.

The new Treaty on Neutrality Between the United States and Panama,[108] contains a unilateral declaration of neutrality[109] by Panama guaranteeing the permanent neutrality of the Canal

> in order that both in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality (art. 2).

The Treaty provides for accession by "all states of the world" by way of a resolution to be sponsored jointly by the United States and Panama in the Organization of American States, where the Protocol of Accession will be deposited (art. 7). Such a declaration, however, contained as it is in a bilateral treaty open to universal accession, need hardly depend for its validity on the vague conditions surrounding unilateral acts not accompanied by these elements. Nevertheless, the creation of clearly enforceable third-party rights will have to await the response by the international community to the Protocol of Accession.[110]

REFERENCES TO CHAPTER III

1. The only exceptions appearing to be the requirements of prior notification for passage of warships issued by Germany in 1936 and by Egypt in 1947, *supra*, pp. 153, 172.

2. See *supra*, p. 185.

3. Lord McNair, *The Law of Treaties* (Oxford, 1961), p. 312, citing C. Rousseau, *Principes Généraux du Droit International Public*, Vol. I (Paris, 1944), pp. 468-71. See also L. Oppenheim, *International Law*, Vol. I, 8th ed., edited by H. Lauterpacht (London, 1855), pp. 925-28; I. Brownlie, *Principles of Public International Law*, 2nd ed. (Oxford, 1973), p. 602. For a less definitive but cautious view see K. Holloway, *Modern Trends in Treaty Law* (London, 1965), p. 583.

4. P.C.I.J., Series A, No. 7 (1926), at pp. 28-29.

5. P.C.I.J., Series A, No. 17 (1928), at p. 45.

6. P.C.I.J., Series A, No. 22 (1929), at pp. 19, 20; see also Series A/B, No. 46 (1932), at pp. 147-48.

7. P.C.I.J., Series A/B, No. 46 (1932), at p. 147.

8. Reproduced in 8 *International Legal Materials* (1969), p. 679.

9. 29 *American Journal of International Law* (1935), Sp. Supp., p. 924.

10. *Ib.*, at p. 926.

11. *Ib.*

12. Diplomatic History of the Panama Canal, Senate Document No. 474, 63rd Cong., 2nd Sess. (1914), pp. 61-68. See also E.A. Whittuck, *International Canals*, Foreign Office Peace Handbook No. 150 (London, 1920), p. 60.

13. See N.J. Padelford, *The Panama Canal in Peace and War* (New York, 1942), p. 33. In 1956 Secretary of State Dulles stated categorically that

> there is no international treaty giving other countries any rights at all in the Panama Canal, except for a treaty with the United Kingdom which provides that it has the right to have the same tolls for its vessels as for ours,

Press Conference of Aug. 28, 1956, Dept. of State Press Release No. 450, in U.S. Dept. of State, *The Suez Canal Problem*, Publication No. 6392 (Washington, D.C., October, 1956), p. 301. Earlier in the same month President Eisenhower stated that the Panama Canal was "strictly... a national undertaking carried out under bilateral treaty," News Conference by President Eisenhower, Aug. 8, 1956, ib., p. 45. Similar views had been expressed in 1914 by Senator Root and in 1921 by Secretary of State Hughes, G.H. Hackworth, Digest of International Law, Vol. 5, p. 222.

14. See supra, pp. 169-170.

15. Royal Institute of International Affairs, Documents on International Affairs, 1936 (London, 1937), p. 282. See supra, pp. 172-173.

16. Oppenheim, supra note 3, at p. 483.

17. International Law Reports (1950), Vol. 17, Case No. 34, p. 133. See supra, p. 172.

18. P.C.I.J., Series A, No. 1 (1923),

19. Ib., at p. 28.

20. G. Schwarzenberger, International Law, Vol. 1, 3rd ed. (London, 1957), p. 223.

21. Ib., at p. 225.

22. Oppenheim, supra note 3, at pp. 927-28 (emphasis added).

23. C. d'Olivier Farran, "The Right of Passage Through International Maritime Canals," Sudan Law Journal and Reports, 1959, p. 206.

24. Executive Order No. 8234, Sept. 5, 1939, Federal Register, Vol. 4 (1939), p. 3823. See supra, pp. 167-169.

25. See supra, pp. 167-169.

26. Egyptian Declaration of April 24, 1957 annexed to letter to the Secretary-General of the United Nations from the Egyptian Minister of Foreign Affairs, U.N. Doc. No. A/3576, S/3818, 1957. See supra, p. 157.

27. See supra, pp. 152-159.

28. J.A. Obieta, The International Status of the Suez Canal, 2nd ed. (The Hague, 1970), pp. 121, 127.

29. Oppenheim, supra note 3, at p. 483; D.P. O'Connell, International Law, Vol. 1 (London, 1965), p. 651.

30. McNair, supra note 3, at p. 309.

31. R.F. Roxburgh, International Conventions and Third States (London, 1917), p. 45.

32. See K. Holloway, supra note 3, at pp. 585-86; L.N. Mathur, "Treaties and Third States," in S.K. Agrawala (ed.) Essays on the Law of Treaties (Madras, 1972), p. 54.

33. See Y.Z. Blum, Historic Titles in International Law (The Hague, (1965), p. 39; Sir G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law," British Yearbook of International Law (1953), pp. 1, 31.

34. (1960) I.C.J. Rep., p. 6.

35. Ib., at p. 39.

36. P.C.I.J., Series A, No. 1 (1923). See supra, pp. 170-172.

37. Brownlie, supra note 3, at p. 7.

38. P.C.I.J., Series A, No. 1 (1923), at p. 25.

39. Ib., at p. 28.

40. See Schwarzenberger, Vol. 1, supra note 20, at p. 225.

41. See infra, pp. 204-208.

42. See Holloway, supra note 3, at p. 554; B. Cheng, General Principles of Law (London, 1953), p. 12.

43. E.g., P. Guggenheim, "Contribution a l'Historie de Sources du Droit de Gens," 94 Hague Recueil (1958), pp. 275-80; Sir J. Fischer Williams, Some Aspects of International Law (New York, 1939), p. 44; H. Kelsen, "Théorie du Droit International Coutumier," Revue Internationale pour la Théorie du Droit (1953), p. 253.

44. See e.g., Oppenheim, supra note 3, at p. 27; J.L. Brierly, The Law of Nations, 6th ed., edited by Sir H. Waldock (New York and Oxford, 1963), p. 61; M. Virally, "The Sources of International Law," in M. Sørensen (ed.) Manual of Public International Law (New York, 1968), pp. 133-34; Schwarzenberger, Vol. 1, supra note 20, at pp. 39-43; H. Kelsen, Principles of International Law, 2nd ed., edited by R.W. Tucker (New York, 1966), pp. 450-51; K. Holloway, supra note 3, at pp. 554-64.

45. See C. Parry, The Sources and Evidences of International Law (Manchester, 1965), pp. 61-62.

46. In the 1905 case of West Rand Central Gold Mining Co., v. The King, the British Court held that a "doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must... be proved by satisfactory evidence," which must show that the alleged rule

> is of such a nature and has been so widely and generally accepted, that it can hardly be supposed that any civilised state would repudiate it

(1905) 2 K.B., p. 391, at p. 407. See also the Judgement of the Permanent Court of Arbitration in the 1910 North Atlantic Coast Fisheries Arbitration, 1 Scott, H.C.R., p. 141.

47. P.C.I.J., Series A, No. 10 (1927).

48. Ib., at p. 28 (emphasis added).

49. (1950) I.C.J. Rep., p. 266.

50. Ib., at pp. 276-77 (emphasis added). See also the Anglo-Norwegian Fisheries Case (1951) I.C.J. Rep., p. 116, at pp. 130-31, 138-39; Rights of Nationals of the United States of America in Morocco, (1952) I.C.J. Rep., p. 176, at pp. 199-200. In the case concerning the Right of Passage over Indian Territory, Judge Chagla (ad hoc), in his Dissenting Opinion pointed out that in order to establish a custom under international law

> it is not enough to have its external manifestation proved; it is equally important that its mental or psychological element must be established. It is this all-important element that distinguishes mere practice or usage from custom. In doing something or in forebearing from doing something the parties must feel that they are doing or forebearing out of a sense of obligation. They must look upon it as something which has the same force as law.... There must be an overriding feeling of compulsion — not physical but legal, that is what the jurisprudence on the subject calls the conviction of necessity.

(1960) I.C.J. Rep., p. 6, at p. 120. See also the Dissenting Opinion of Judge Armand-Ugon, at p. 82.

51. In deciding that the equidistance method of delimiting the continental shelf had not become a rule of customary international law on the basis of the practice after the 1958 Geneva Convention, the Court spoke of the "indispensable requirement" that state practice be

> both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such way as to show that a rule of law or legal obligation is involved.

(1969) I.C.J. Rep., p. 3, at p. 43.

52. (United Kingdom v. Iceland) (1974) I.C.J. Rep., p. 3, at p. 23. See especially the Joint Separate Opinion of Judges Forster, Bengzon, Jimenez de Arechaga, Nagendra Singh, and Ruda, at p. 49.

53. See I. MacGibbon, "Customary International Law and Acquiescence," British Yearbook of International Law, Vol. 33 (1957), p. 115; Virally, supra note 44, at p. 134.

54. Supra, pp. 195-196.

55. Supra, note 24.

56. Kiel Canal Collision Case, International Law Reports (1950), Vol. 17, Case No. 34, p. 133. See supra, p. 194.

57 Oppenheim, supra note 3, at pp. 535-43.

58. H. Lauterpacht, Private Law Sources and Analogies of International Law (London, 1927), pp. 119-24, 238.

59. D.P. O'Connell, International Law, Vol. 1 (London, 1965), pp. 602-11.

60. Brierly, supra note 44, at pp. 190-94.

61. McNair, supra note 3, at p. 651. See also by the same author, "The So-Called State Servitudes," British Yearbook of International Law (1925), p. 111.

62. Brownlie, supra note 3, at p. 360.

63. Schwarzenberger, Vol. 1, supra note 20, at pp. 209-15.

64. F.A. Valí, Servitudes in International Law, 2nd ed. (New York, 1958) p. 191.

65. H.D. Reid, International Servitudes in Law and Practice (Chicago, 1932), p. 31.

66. C. Fenwick, International Law, 4th ed. (New York, 1965), p. 472 (emphasis added).

67. O'Connell, supra note 63, at p. 641 (emphasis added).

68. M. Akehurst, A Modern Introduction to International Law (London, 1970), p. 197.

69. Vali, supra note 64, at pp. 19-20, 310 (emphasis added). For a similar view see J.F. Hostie, "Notes on the International Statute of the Suez Canal," 31 Tulane Law Review (1957), pp. 418-19.

70. M. Whiteman, Digest of International Law, Vol. 2, p. 1183. However, R.R. Baxter, a noted advocate of international rights of passage through interoceanic canals, rejects the use of the concept in the case of these waterways, primarily because of the doctrine's "questionable position in international law," The Law of International Waterways (Cambridge, Mass., 1964), p. 177.

71. Brierly, supra note 44, at p. 191.

72. Though the German Supreme Court (British Zone) in the 1950 Kiel Canal Collision Case considered the limitation of sovereignty in the case of interoceanic canals as a "kind of state servitude in so far as the freedom of navigation requires the same," International Law Reports (1950), Vol. 17, Case No. 34, p. 133.

73. 1 Scott, H.C.R., p. 141.

74. Ib., at p. 160. In the 1903 Faber Case, the Umpire, in defending Venezuela's right to complete control over the Catatumbo and Zulia Rivers, stated:

> It certainly is a novel proposition that because one may be so situated that the use of the property of another will be of special advantage to him he may on that ground demand such use as a right. The rights of an individual are not created or determined by his wants or even his necessities. The starving man who takes the bread of another without right is none the less a thief, legally, although the immorality of the act is so slight as to justify it. Wants or necessities of individuals cannot create legal rights for them, or infringe the existing rights of others....

J.H. Ralston, Venezuelan Arbitrations of 1903, p. 600.

75. P.C.I.J., Series A, No. 1 (1923).

76. Ib., at p. 24. Though Judge Schücking in his Dissenting Opinion found the concept appropriate to the case at hand, ib., at p. 43.

77. See e.g., O'Connell, supra note 67, at p. 606.

78. Valí sees the right of passage through an interoceanic canal as a general — not particular — restriction on territorial sovereignty which has no relation to international servitudes, supra note 69 and accompanying text.

79. Schwarzenberger, Vol. 1, supra note 20, at p. 213.

80. P.C.I.J., Series A, No. 1 (1923).

81. Ib., at p. 28 (emphasis added).

82. Baxter, supra note 70, at p. 183.

83. McNair, supra note 3, at p. 266.

84. Baxter, supra note 70, at p. 182.

85. Ib.

86. Ib., at p. 308 (emphasis added). It has been suggested that such a situation is applicable to the Amazon River. Since that river is navigable to some extent by oceangoing vessels, reliance on the waterway by foreign vessels created pressure on Brazil which resulted in the opening of the Amazon to free navigation "to merchant vessels of all nations" by an imperial decree in 1867. On the basis of the opening of the waterway to international use and the increasing reliance on it by other states, claims to free navigation on the

Amazon were successfully asserted by both riparian and non-riparian states. See G.E. Glos, International Rivers (Singapore, 1961), pp. 14, 18, 21; Hackworth, Digest, Vol. 1, p. 607. The international status of the River was confirmed by virtue of the Treaty of Commerce and Fluvial Navigation Between Bolivia and Brazil signed in 1910, Martens, N.R.G. 3d. ser. (1913) 632.

87. Ib., at p. 183.

88. An analogy can be made with most-favoured-nation treatment clauses. In such cases, the promisor of most-favoured-nation treatment is bound toward the beneficiary to grant him all the rights and benefits in the same field which he has granted or is granting to third states. British practice, for example, has favoured the "unconditional" type of clause, whereby a state is entitled to claim for its nationals the greatest privileges granted by the other contracting party to the nationals of any third state, whether or not those favours have been granted to the third state in return for equivalent concessions, McNair, supra note 3, at p. 275.

89. Ib., at p. 184.

90. C. d'Olivier Farran, "The Right of Passage Through International Maritime Canals," Sudan Law Journal and Reports, 1959, pp. 140-211.

91. Ib., at p. 204.

92. Baxter, supra note 70, at p. 308.

93. See supra, pp. 197-201.

94. McNair, supra note 3, at p. 11; Brownlie, supra note 3, at p. 616.

95. In the Eastern Greenland Case in 1933, the Permanent Court of International Justice found that an oral declaration made by the Norwegian Foreign Minister (the so-called Ihlen Declaration) to the Danish Minister to Norway was binding upon Norway, P.C.I.J. Series A/B, No. 53 (1933), at p. 71. In the Nuclear Tests Case in 1974, the International Court of Justice held that public statements by the French President and his Ministers of Defence and Foreign Affairs regarding termination of nuclear atmospheric tests in 1974 "constitute an undertaking possessing legal effect," (1974), I.C.J. Rep., at p. 269.

96. Declarations were included in international engagements in the Customs Regime Between Germany and Austria Case in 1931. The Permanent Court of International Justice stated:

> As regards the Protocol signed at Geneva on October 4, 1922, by Austria, France, Great Britain, Italy, and Czechoslovakia, and subsequently acceded to by Belgium and Spain, it cannot be denied that, although it took the form of a declaration, Austria did assume thereby certain undertakings in the economic

> sphere. From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchanges of notes.

P.C.I.J., Series A/B, No. 41 (1931), at p. 47. In the Advisory Opinion on the *Minority Schools in Albania* the Permanent Court was of the view that amendments made to the Albanian Constitution in 1933 contravened a Declaration made in 1921 before the League Council regarding minority rights, P.C.I.J., Series A/B, No. 64 (1935), at p. 19.

97. Obieta, *supra* note 28, at p. 29.

98. *Ib.*, pp. 54, 60, 89, 97, 108. It is interesting to note that the Egyptian Declaration of 1957, in the article (1) reaffirming the Constantinople Convention, expressly refers to the "*rights*... arising therefrom." See *supra* note 26.

99. In Obieta's view, despite the Declaration, the passage of warships in time of peace is at the discretion of the sovereign, and in time of war the rules of neutrality demand that the canal be closed to the warships of belligerents, *supra* note 28, at pp. 45 – 46 . On neutralization, see *infra*, Ch. 4.

100. E.g., offer, recognition, promise, notification, protest, renunciation See Schwarzenberger, Vol. 1, *supra* note 20, at pp. 548-61.

101. See e.g., A. Verdross, *Derecho Internacional Publico* (Madrid, 1955), p. 139; G. Biscottini, *Contributo alla Teoria degli Atti Unilaterali nel Diritto Internatzionale* (Milan, 1951), Ch. 4; J.W. Garner, "The International Binding Force of Unilateral Oral Declarations," 27 *American Journal of International Law* (1933), pp. 493-97.

102. See e.g., McNair, *supra* note 3, at p. 11; O'Connell, *supra* note 67, at pp. 217-18; Brownlie, *supra* note 3, at p. 616; Schwarzenberger, Vol. 1, *supra* note 20, at pp. 158-59, 421-22, 548-61; Virally, *supra* note 44, at pp. 155-56.

103. Obieta, *supra* note 28, at p. 29 (emphasis added).

104. See McNair, *supra* note 3, at p. 11.

105. See *infra*, pp. 228-230.

106. See *supra*, Ch. 1, pp. 151-159.

107. Obieta, *supra* note 28, at p. 127.

108. Rep. in 16 *International Legal Materials* (1977), p. 1040.

109. According to article 1

> The Republic of Panama declares that the Canal, as an international transit waterway, shall be permanently neutral in accordance with the regime established by this Treaty.

A statement by Panama's Foreign Minister explaining the Treaty referred to this article expressly as a "unilateral declaration" by Panama, even though contained in a bilateral treaty, La Estrella de Panama, Aug. 19, 1977, p. 22.

110. See supra, Ch. 1, note 92.

CHAPTER IV

THE DETERMINANTS OF PASSAGE (CONT.): NEUTRALIZATION

A. REMOVAL FROM THE REGION OF WAR

Perhaps one of the most ambiguous concepts found in the discipline of international law is that of neutrality. A factor accounting for this has been the effect of the two World Wars on its development and codification, which, together with the laws of war, flourished to a great extent during the late Nineteenth and early Twentieth Centuries. The devastation and lack of respect toward these laws that characterized both wars, together with the greater community concern for the outlawry of war altogether, caused less attention to be focused on the law of war and neutrality.[1] The present-day structure of world society and the nature of modern-day nuclear warfare has made neutrality, especially as it refers to states, a difficult alternative.[2] Nevertheless, the doctrine still survives, and has been applied consistently to uninhabited regions of international importance such as rivers, canals, outer space[3] and Antarctica.[4] Being in many cases vital thoroughfares, the concern of the international community for international waterways has centered on the necessity of maintaining their integrity and security during any international conflagration that could threaten their use.

In its simplest form, neutrality refers to the condition of a state not involved in a particular war which adopts an impartial attitude toward belligerents and of non-participation in the war, with the belligerents in turn respecting the inviolability of the neutral state's territory.[5] Neutralization is the process of permanently guaranteeing the neutrality of that state by a treaty usually signed by a number of guaranteeing states (e.g., Switzerland since 1815).[6] The neutralization of a particular part of the territory of a state, however, is another matter. Here the concept refers to the exclusion of that territory from the region of war and, therefore, to the position of the belligerents and their territory, and not to the status of neutrals.[7] In the words of Oppenheim, such neutralization

> denotes the exclusion by treaty of a particular part of the territory of a state from the region of war so that warlike preparations or operations become illegal thereon.[8]

On the basis of this definition, Oppenheim considers that the Panama and Suez Canals were permanently neutralized by their respective conventions,[9] a view shared, for example, by Fenwick,[10] Castren,[11] and, with regard to the Suez Canal alone, by Obieta.[12]

In the case of the Suez Canal, the Constantinople Convention[13] provides that the Canal is to be open "in time of war as in time of peace to every vessel of commerce or of war" (art. 1), and to belligerent warships, (art. 4). The Canal is never to be blockaded (art. 1), and no "right of war" or "act of hostility" is to be committed in the Canal, its ports, or within a 3-mile radius of these (art. 4). In the case of the Panama Canal, article 3 of the Hay-Pauncefote Treaty[14] adopted "as the basis of the neutralization of such ship canal, the... rules substantially as embodied in the Convention of Constantinople." The Canal is to remain open to vessels "of commerce and of war of all nations observing these rules on terms of entire equality" (para. 1).[15] It was never to be blockaded, nor "any right of war" or "act of hostility" committed within it (para. 2). Both conventions contain rules under which the transit of belligerent war vessels is to be effected. Hence, these two waterways were effectively removed from the region of war by their respective conventions. The new

Neutrality Treaty[16] signed between the United States and Panama stipulates that the Canal

> in time of peace and in time of war... shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality, so that there will be no discrimination against any nation, or its citizens or subjects, concerning the conditions or charges of transit, or for any other reason, and so that the Canal, and therefore the Isthmus of Panama, shall not be the target of reprisals in any armed conflict between other nations of the world (art. 2; emphasis added).

Transiting vessels are not to commit any "acts of hostility" (art. 2.c), and the Canal is to remain open to "vessels of war and auxiliary vessels of all nations... at all times" (art. 3.1.e). Unlike the Hay-Pauncefote and Constantinople Conventions, however, there are no provisions regarding special conditions under which the transit of belligerent war vessels is to be effected.

In the case of the Kiel Canal, it was not intended at the time of its construction to be neutralized since it was built for internal military purposes.[17] The 1919 Treaty of Versailles,[18] while providing for the passage of "vessels of commerce and of war of all nations at peace with Germany" (art. 380), contains no provisions relating to neutralization or removal from the region of war, this latter being the reason Oppenheim does not consider that waterways as being neutralized.[19]

A variation of this particular notion of neutralization as regards removal from the region of war is adopted by Baxter. He considers neutralization as

> the status of a territory or watercourse which by international agreement... is not to be employed for military purposes by the territorial sovereign and is not to be the subject of hostile military operations by other nations.[20]

In Baxter's view this notion implies a demilitarization of the canal area.[21] Hence, such a view would prohibit both hostile acts by foreign states and fortification by the canal state. The question as to whether fortification is inconsistent with the neutralization of waterways has been a matter of some debate among writers of international law.[22] While article 11 of the Constantinople Convention forbids the permanent fortification of the Canal, this action is disallowed only to the extent that it might "interfere with the freedom and complete safety of the navigation" (art. 8). Moreover, article 10 gives the Sultan and the Khedive of Egypt the right to take "any measures... to assure by their own forces the defence of Egypt and the maintenance of public order." In the case of the Panama Canal the right of fortification is clearly provided for. Article 3.2 of the Hay-Pauncefote Treaty gives the United States the right to "maintain such military police along the Canal as might be necessary to protect it against lawlessness and disorder" (emphasis added), and article 23 of the Hay-Bunau Varilla Treaty[23] gives the United States "the right, at all times and in its discretion, to use its police and its land and naval forces or to establish fortifications for these purposes" (emphasis added).

In view of the legal foundations provided by the conventions, it appears clear that the type of neutralization envisaged by the parties to the respective arrangements included the use of defensive measures, and was limited primarily to the removal of the canal area from the region of war and to the use of the canal by belligerent vessels under certain conditions. As described earlier,[24] however, state practice as regards the three canals has been disappointing. The three waterways have been attacked by enemies and the respective riparians have not hesitated in placing restrictions on enemy and neutral vessels — both merchant and men-of-war — when their strategic or defence needs were perceived as being in jeopardy.

B. THE WIMBLEDON CASE AND THE PASSAGE OF BELLIGERENT WARSHIPS

The decision of the Permanent Court of International Justice in 1923, assimilating interoceanic canals to natural straits in the sense that passage of belligerent men-of-war would not compromise the riparian state's neutrality, contributed a controversial dimension to the question of neutralization as it applies to the status of the Suez, Panama, and Kiel Canals. The question facing the Court was straightforward: was Germany bound to allow passage through the Kiel Canal of a merchant vessel carrying war material to Poland, which was then at war with Russia? The answer would appear to be equally straightforward: according to article 380 of the Treaty of Versailles, the Canal was to remain "free and open to the vessels of commerce and of war of all nations at peace with Germany." Since the flag state (Britain), the state chartering the vessel (France), and Poland were all at peace with Germany, and, moreover, were all parties to the Treaty, a strict interpretation of article 380 would have bound Germany to allow the passage, her own neutrality notwithstanding. However, the Court apparently sought to spare Germany the responsibility of complying with the strict provisions of the Treaty at the expense of her obligations under customary international law toward a belligerent who was not a party to the Treaty (Russia). The Court therefore turned to the "precedents" and "illustrations" afforded by the Suez and Panama Canals, and determined that these were "permanently dedicated to the use of the whole world," and were thus "assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign state."[26]

The Court, however, would appear to have taken rather generous liberties in determining the status of these canals.[27] By the questionable use of "precedents" and "illustrations" the Court assumed that the signatories to the Suez and Panama Conventions had "permanently dedicated" these canals "to the use of the whole world" to the point where they could be assimilated to natural straits. In this way, the Court attempted to give these treaties a legislative effect extending beyond the signatories to third parties and thus binding the canal-states to grant passage to belligerent warships under the customary international law governing straits.

It is a rule of international customary law that the passage of belligerent troops through neutral territory is prohibited.[28] This would apply to interoceanic canals, since these waterways are within the territory of a state and consist of internal waters. It is also a universally recognized rule, however, that the nuetrality of a power is not affected by the mere passage of belligerent warships or prizes through its territorial waters,[29] and there is some authority for the view that such passage cannot be denied through international straits.[30] Thus, by assimilating canals — on the basis of a "permanent dedication" — to straits, the Court could then logically impose upon the riparian an obligation to allow a right of passage for belligerent warships through these waterways. Whether such passage is consistent with the neutralization of interoceanic canals has been a controversial matter before as well as after the Wimbledon decision. Bonfils, writing in 1914 and referring to the Suez Canal, argues that the use of the term neutralization in the case of that waterway "fails to define the international situation. If it were neutralized it would be closed to warships of belligerents."[31] In

Whittuck's view, writing in 1920, such a right of passage would allow the Panama and Suez Canals to be neutralized, "though only imperfectly."[32] To Hallberg, writing shortly after the World Court decision, the Suez Canal is neutralized in the sense that it is removed from the region of war, but not neutralized in the sense that it permits the passage of belligerent warships. As a result, he concludes that the status of the Canal is "_sui generis_, common to all vessels, to whom warlike operations are denied while passing through."[33] In Brierly's view, the Suez, Panama, and Kiel Canals are "inaccurately said to be 'neutralized'."[34] Obieta challenges the Court's findings. In his view, it is "self evident" that the riparian must be free to take measures to protect its interests as a belligerent or neutral power. Consequently, "the rules of neutrality demand that the Canal be closed to the warships of belligerents."[35] Colombos is also unequivocal: "these canals are not neutralized, as this would have involved their being closed to vessels of war. They are simply declared inviolable in time of war."[36] Schwarzenberger sees the decision as having modified the traditional meaning of neutralization as it applies to these waterways. In his view, the term, when referring to the Panama, Suez, and Kiel Canals, "is used in a less stringent sense" as a result of the assimilation to natural straits for the purpose of passage of belligerent warships.[37]

C. AN EVALUATION

Because of the vital importance of interoceanic canals to maritime communication, the concept of neutralization is one that, from the point of view of the world community, is both ideally suited and imperative to the nature of these waterways. An international status that can effectively remove these thoroughfares from the region of war is a logical community demand. It is submitted, however, that the doctrine has been so strained in the effort to thus apply it, as to render it, in practical terms, untenable.

To begin with, the neutrality provisions of the Suez and Panama Conventions, as indicated earlier,[38] are not identical in their terms, and the Kiel Canal provisions of the Treaty of Versailles make no mention of defence, fortification, or any aspect of neutralization. More importantly, however, whatever the nature of neutralization contemplated in the respective Suez and Panama Conventions and the dimension added by the World Court in the Wimbledon Case, these cannot be divorced from the actual practice as to these waterways.

Despite the intentions of the signatories to the respective conventions, these waterways have been attacked by enemies and defended by their sovereigns. Rather than being a haven from hostilities, these canals (particularly the Suez Canal), have, during time of war, become strategic military targets. The riparians on their part, have not hesitated in placing varying degrees of restrictions on both merchant and war vessels in accordance with their own perceived strategic needs, notwithstanding any treaty provisions to the contrary. The practice as to these waterways clearly reveals that their purported neutralization has consistently yielded to strategic and political realities.

This experience can hardly be surprising. Each canal represents at once an invaluable resource to its sovereign state and a benefit to international communication, factors that also serve to convert these waterways into strategic prizes. As was evidenced in the case of the Suez Canal, it is not necessary for an actual state of war to exist in order for such a transformation to take place. Any international situation which produces a tension between the riparian and any other state or states can involve a threat to the riparian state and, therefore, to the canal itself. The mere fact that the waterway is, in theory, "neutralized," is of little comfort to the riparian, and no effective guarantee that it will be spared by an adversary. Neither is an actual physical threat necessary to produce a reaction from the riparian. As was shown in the case of the Suez Canal, the waterway can also be a convenient instrument for the protection of political interests.[39] Hence, two factors are involved: that of legitimate self-defence, and that of safeguarding the riparian's political interests.

In the first case, it would be sheer folly to expect Egypt, for example, to permit the passage of any Israeli vessel during a time of either open or suspended hostilities between both countries. The question as to whether the General Armistice (Rhodes) Agreement of February 24, 1949[40] put an end to the state of war or merely suspended actual hostilities between Egypt and Israel sparked lively debate among international lawyers.[41] It is submitted, however, that as far as the actual passage of Israeli vessels is concerned, the question is academic. During a period of intense tension such as characterized the two states at the time, it would have been unrealistic to expect Egypt to permit such a passage. When considering the damage a scuttled vessel or act of sabotage can produce in a canal, permitting such a passage would run counter to the basic principle of self-defence. A passing merchant vessel could conceivably lay mines or merely carry out observations of Egyptian military installations. It is one thing to agree to a cessation of fighting, and quite another to allow an enemy vessel to enter deep inside your territory by way of a waterway at once vital and vulnerable.

In their Joint Dissenting Opinion in the Wimbledon Case,[42] Judges Anzilloti and Huber stated:

> It must be remembered that international conventions and more particularly those relating to commerce and communications are generally concluded having regard to normal peace conditions. If, as a result of war, a neutral or belligerent state is faced with the necessity of taking extraordinary measures temporarily affecting the application of such conventions in order to protect its neutrality or for the purposes of national defence, it is entitled to do so, even if no express reservations are made in the convention.[43]

The Judges agreed that a state might enter into arrangements affecting its freedom of action, but that

> engagements of this kind, having regard to the gravity of the consequences which may ensue, can never be assumed.... The right of a state to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it, even though these stipulations do not conflict with such an interpretation.[44]

The passage of neutral vessels which might be carrying contraband is not as clear a matter, since the riparian cannot claim outright that the passage itself presents a military threat to the state or to the canal proper. Neither can it be expected, however, that the riparian deny itself the opportunity to visit and search neutral merchant vessels in order to determine whether there is contraband on board and to seize such cargo.[45] If the cargo consists of arms and munitions destined for the enemy, there can be little doubt that the seizure of such contraband (referred to as absolute contraband[46]) is justified from the point of view of self-defence, if not of common sense. It would be difficult to imagine the United States allowing the transport of munitions to its enemy through the Panama Canal during wartime.

The more difficult theoretical problem is that involving non-military cargo which might still assist the enemy's war efforts, such as provisions or coal (referred to as conditional contraband[47]), and which, under the (unratified) Declaration of London of 1909, could be seized only if destined for the use of the armed forces or a government department of the enemy state (art. 33). The distinction between absolute contraband, where hostile destination was sufficient, and conditional contraband, where a closer association with warlike operations was also required, became for the most part theoretical, especially after the First World War.[48] During modern warfare, there is hardly a commodity that cannot be considered useful to the enemy's war effort, and it is generally held by publicists that any article destined for the enemy (save those which serve to aid the sick and wounded or for the use of the vessel or its crew) enabling him to carry on the war with greater vigor can be declared contraband.[49] Egypt, for example, in 1953, included foodstuffs and "other commodities likely to strengthen the war potential" of Israel as contraband.[50] Even Egypt's practice of demanding certificates of ultimate destination of cargo from transiting neutral vessels finds support in law, since goods can be regarded as contraband if they are ultimately to become the property of the enemy, regardless of the fact that the vessel, the consignor, and the consignee are all neutrals.[51]

Hence, in the case of the Suez Canal, the actions taken by Egypt prior to the 1949 Armistice would appear to be consistent with the logical and accepted principle that the canal state cannot reasonably be expected to allow enemy shipping or contraband through its waterway. Whether these restrictions were lawful after the 1949 Armistice depends upon the interpretation of that agreement, not upon canal law. This, however, cannot condone the abuses committed by Egypt, involving, for example, the blacklisting of vessels which had previously carried cargo to Israel,[52] the removal of an Israeli crew-member from the Danish merchant vessel Brigitte Toft in 1957,[53] or the maltreatment of crews to which merchant vessels trading with Israel were at times subjected to.[54]

In the end, the Suez, Panama, and Kiel Canals, being vital waterways owned and operated by sovereign states, are defended by their sovereigns and subjected to measures each finds necessary to take when the canal or the interests of the sovereign are threatened. It is interesting to note in this regard that the Barcelona Convention of 1921[55] concerning international rivers allows the riparian state the discretion to forbid passage to a belligerent or to warships even of states not at war, and there would appear to be no reason in this respect to distinguish between rivers and canals.

In practice, the purported neutralization of these canals has yielded to the realities of the modern sovereign state system and of modern warfare.[56] Neutralization by its very nature involves the guaranteed preservation of the integrity of the waterway. In the case of these three canals, no guarantee from the international community exists, nor can any be reasonably expected from the respective sovereigns.[57]

REFERENCES TO CHAPTER IV

1. E. Castren, *The Present Law of War and Neutrality* (Helsinki, 1954), pp. 1, 7-8; N. Ørvik, *The Decline of Neutrality* 1914-1941, 2nd ed. (London, 1971), pp. 268-302.

2. Though, e.g., Schwarzenberger considers the pendulum may have swung in the other direction, in the sense that an increasing number of countries might prefer "to be spectators in a fight to the finish between the giant powers," *A Manual of International Law*, 6th ed., (Milton, England, 1976), p. 177.

3. C.E. Black, *et. al*., *Neutralization and World Politics* (New Jersey, 1968), p. 11.

4. See the Antarctica Treaty of December 1, 1959, Cmnd. 913, 1959; 54 *American Journal of International Law* (1960), p. 476.

5. Schwarzenberger, *Manual*, *supra* note 2, at p. 176; H.W. Briggs, *The Law of Nations*, 2nd ed. (New York, 1952), p. 1038.

6. Castren, *supra* note 1, at p. 430; L. Oppenheim, *International Law*, Vol. 1, 8th ed. edited by H. Lauterpacht (London, 1957), p. 244.

7. K. Skubiszewski, "Law of War and Neutrality," in M. Sørensen (ed.) *Manual of Public International Law* (London, 1968), p. 843.

8. L. Oppenheim, *International Law*, Vol. 2, 7th ed., edited by H. Lauterpacht (London, 1952), p. 244, n. 1.

9. *Ib*., at p. 245.

10. C.G. Fenwick, *International Law*, 4th ed. (New York, 1965), p. 473. See also M. Sahovic and W.W. Bishop, "State Territory in International Law," in Sørensen (ed.), *supra* note 7, at p. 331.

11. Castren, *supra* note 1, at p. 139.

12. J.A. Obieta, *The International Status of the Suez Canal* (The Hague, 1970), pp. 69-70.

13. "Convention Between Great Britain, Austria-Hungary, France, Germany, Italy, The Netherlands, Russia, Spain, and Turkey respecting the Free Navigation of the Suez Canal" (Constantinople Convention), Oct. 20, 1888, 79 *British and Foreign State Papers*, p. 18.

14. "Treaty Between the United States and Great Britain to Facilitate the Construction of a Ship Canal" (Hay-Pauncefote Treaty), Nov. 18, 1901, 94 *British and Foreign State Papers*, p. 473.

15. Unlike the Constantinople Convention, the Hay-Pauncefote Treaty is silent as to passage _during time of war_. This omission, however, cannot be construed as indicating that the Canal is not to be open during third-party wars, since this would render the neutralization provisions meaningless. See R.R. Baxter, _The Law of International Waterways_ (Cambridge, Mass., 1964), p. 217; E.A. Whittuck, _International Canals_, Peace Handbooks, Vol. 23, No. 150 (London, 1920), p. 55.

16. "Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal," Sept. 7, 1977, rep. in 16 _International Legal Materials_ (1977), p. 1040.

17. See _supra_, pp. 169-172.

18. "Treaty of Peace Between the Allied and Associated Powers and Germany" (Treaty of Versailles), June 28, 1919, 112 _British and Foreign State Papers_, p. 1.

19. Oppenheim, Vol. 2, _supra_ note 8, at p. 245, n. 5.

20. Baxter, _supra_ note 15, at p. 327.

21. _Ib_. See also F.A. Valí, _Servitudes in International Law_, 2nd ed. (New York, 1958), pp. 263-72.

22. The matter sparked a lively debate during the time of the construction of the Panama Canal. For the view that fortification is _not inconsistent_ with neutralization see H. Arias, _The Panama Canal_ (London, 1911), p. 186; E. Wambaugh, "The Right to Fortify the Panama Canal," 5 _American Journal of International Law_ (1911), p. 617, n. 11; E.A. Whittuck, _supra_ note 15, at p. 58.

    H.S. Knapp argues that the Panama Canal is not neutralized since its protection is not guaranteed by a union of powerful states. Hence, fortification is permitted, "The Real Status of the Panama Canal as Regards Neutralization," 4 _American Journal of International Law_ (1910), p. 356. A similar view is held by G.W. Davis, "Fortifications at Panama," 3 _ib_. (1909), p. 885.

    For the view that fortification _is inconsistent_ with neutralization, see R. Olney, "Fortification of the Panama Canal," 5 _ib_. (1911), p. 298; P.C. Hains, "Neutralization of the Panama Canal," 3 _ib_. (1909), pp. 354, 384. According to C.F. Wicker, fortification of a parmanently neutralized territory is inconsistent with neutrality since the burden of defence must be borne by the guarantors, "Some Effects of Neutralization," _ib_., p. 650.

23. _Supra_ Ch. II, note 4.

24. _Supra_ Ch. I, pp.151-174.

25. P.C.I.J., Series A, No. 1 (1923).

26. Ib., at p. 28.

27. According to Schwarzenberger, the Court, in this regard, came "very near to straying from the path of legal rectitude," International Law, 3rd ed., Vol. 1 (London, 1957), p. 223. See also D.P. O'Connell, International Law, Vol. 1 (London, 1965), p. 641.

28. Article 2 of the 1907 Hague Convention (V) forbids the movement of troops or convoys of either munitions of war or supplies across the territory of a neutral power, 36 U.S. Statutes-at-Large, 2310. See Schwarzenberger, Manual, supra note 2, at p. 179.

29. This is stipulated in article 10 of the 1907 Hague Convention (XIII), 36 U.S. Statutes-at-Large, 2415. Such passage, however, is also governed by the overriding principle that neutral territorial waters are not to be used for warlike activities of either belligerent, Oppenheim, Vol. 2, supra note 8, at p. 694. In February, 1940 the German transport Altmark was attacked in Norwegian territorial waters by a British destroyer. Great Britain justified the action on the grounds that the British prisoners on board the Altmark exempted that vessel from the rule of free passage through territorial waters, Hackworth, Digest, Vol. VII, p. 568.

30. See Oppenheim, Vol. 2, supra note 8, at p. 696; see also Part One of this dissertation, pp. 58-66.

31. H. Bonfils, Manuel de Droit International Public, 7th ed., edited by P. Fauchille (Paris, 1914), p. 338.

32. Whittuck, supra note 15, at p. 3.

33. C.W. Hallberg, The Suez Canal (New York, 1931), p. 294.

34. J.L. Brierly, The Law of Nations, 6th ed., edited by Sir H. Waldock (New York and Oxford, 1963), p. 233.

35. Obieta, supra note 12, at pp. 44-45.

36. C.J. Colombos, The International Law of the Sea, 6th rev. ed. (New York, 1967), p. 200. See also N.J. Padelford, "American Rights in the Panama Canal," 34 American Journal of International Law (1940), pp. 419, 422.

37. Schwarzenberger, Manual, supra note 2, at p. 179. Schwarzenberger refers to this as a case of "negative neutralisation." In such a situation, an area forming part of a national territory is opened up to international maritime traffic with the intent to

> assimilate the area in question to the high seas and discharge the canal-state from obligations of neutrality otherwise incumbent upon it.

International Law, Vol. 2 (London, 1968), p. 552.

38. See supra, Ch. 2.

39. See supra, Ch. 1, pp. 151-159.

40. 42 U.N.T.S., 251.

41. See infra, pp. 230-231.

42. P.C.I.J., Series A, No. 1 (1923).

43. Ib., at p. 36.

44. Ib., at p. 37.

45. During the Italo-Turkish War in 1912, a French mail steamer, the Carthage, enroute from Marseilles to Tunis, was captured by an Italian torpedo-boat on the grounds that an aeroplane on board the Carthage was contraband. The vessel was released after the Italians were assured that the aeroplane was intended solely for exhibition purposes. The question as to whether the vessel's capture was justified was referred to the Permanent Court of Arbitration in 1913 which found against Italy. While acknowledging that a belligernt warship as a general rule has a right to stop a neutral vessel on the high seas and to search it for contraband, the Court maintained that the legality of an act going beyond a mere search must be based on sufficient reasons to believe such a trade exists. In the case at hand,

> "The information possessed by the Italian authorities was of too general a nature and had too little connection with the aeroplane in question to constitute sufficient legal grounds to believe in a hostile destination and, consequently to justify the seizure of the vessel which was transporting it."

Scott, H.C.R., Vol. 1, p. 330, at p. 333.

46. See article 23 of the (unratified) Declaration of London, February 26, 1909, in A.P. Higgins, The Hague Peace Conferences (Cambridge, 1909), p. 540.

47. Ib., art. 25.

48. Though British practice during both wars preserved the old classification between absolute and conditional contraband, Colombos, supra note 36, at pp. 682, 688.

49. See e.g., Oppenheim, Vol. 2, supra note 8, at pp. 799, 811-12; Schwarzenberger, Vol. 2, supra note 37, at pp. 619-20; Castren, supra note 1, at pp. 552-53.

50. Whiteman, Digest, Vol. 3, p. 1089.

51. Even though the legal property in the goods has not passed from the consignor at the time of capture does not matter, since capture is considered as delivery and the goods treated by a Prize Court as enemy property. See The Sally (1795) 3 C. ROB. 300n., 302; The

Louisiana (1918) A.C. 461; The Rijn (1917) P. 145; The Twee Ambt (1920) P. 413; The Glenroy (No. 2) (1943) LL. P.C. 153 (2 Vols.) 153; (1945), ib., 191. See also Colombos, supra note 36, at p. 563; Oppenheim, Vol. 2, supra note 8, at p. 809, n. 1.

52. U.N. Sec. Council Off. Records, 549th Meeting, July 26, 1951, p. 3.

53. A.D. Watts, "The Protection of Alien Seamen," 7 International and Comparative Law Quarterly (1958), pp. 691-93.

54. E.g., in August 1957 the Norwegian freighter Mars carrying copra to Israel was delayed for 4 days without explanation, during which time, and in spite of the intense heat, no fresh water or food was provided the crew, letter of August 23, 1957 from the Israeli Government to the President of the Security Council, Sec. Council Doc. S/3870. For similar incidents see Obieta, supra note 12, at pp. 112-21. See also supra, pp. 153-159.

55. "Convention and Statute on the Regime of Navigable Waterways of International Concern" (Barcelona Convention), April 20, 1921, 7 L.N.T.S., 35 (arts. 15, 17).

56. In the view of Baxter, "Neutralization as applied to international waterways can only lead to the conclusion that there has been little confidence in this device as a means of preserving the integrity of the waterway," supra note 15, at p. 338. See also A. Maity, "The International Status of the Panama Canal," The Calcutta Review, Nov., 1952, p. 132.

57. With regard to the new Neutrality Treaty, it is interesting to note that even though Panama solemnly declares the "permanent neutrality" of the Canal, and a protocol of accession open to "all states of the world" is to be deposited at the Organization of American States, the United States has assured itself of the right to "maintain" that neutrality by military means even after the complete transfer of the Canal and the Canal Zone to Panama at the end of this century. Though there has been some disagreement as to the precise limits of this right, the U.S. State Department, including the American negotiators, have viewed this as an unlimited right which will allow U.S. forces to intervene in Panama in case of an internal uprising that could threaten navigation through the Canal, The Star and Herald, Panama, R.P., October 13, 1977, p. 1. A "statement of understanding" issued by President Carter and Panamanian Chief of State Torrijos to supposedly clarify the matter, stipulated that the United States and Panama would "defend the Canal against any threat" to its neutrality or to "the peaceful transit of vessels," ib., October 21, 1977, p. 1. Upon ratifying the Neutrality Treaty, the United States Senate attached a reservation allowing the United States to intervene militarily in Panama after the year 2000 if the security of the Canal should be threatened in any way. Upon ratifying the Panama Canal Treaty a month later, however, a reservation was attached to that Treaty indicating that the earlier reservation should not be interpreted as allowing the United States a right to intervene in the internal affairs of

Panama or to direct any military action against the territorial integrity or political independence of that country. The Panamanian Government has accepted these reservations, The Star and Herald, Panama, R.P., March 17, 1978, p. 1; April 19, 1978, p. 1.

CONCLUSIONS TO PART TWO

The foregoing examination of the legal foundations and practice as to the Suez, Panama, and Kiel Canals has been based upon a fundamental question: that of determining whether there exists a right on the part of the international community to the use of an artifical waterway of vital importance to that community but constructed, owned, and operated by a territorial sovereign.

The practice has shown that the respective riparian states have allowed the virtually untrammeled transit of merchant and war vessels during times when the riparians enjoyed an unqualified state of peace. That this has been a consistent practice cannot, as we have seen, be claimed as evidence of the existence of a right. An examination of the legal arrangements governing each canal, and of the various legal doctrines at times ascribed to their nature, fails to reveal the existence of a perfect and enforceable legal right of passage through these canals in favour of third-party states. Hence, to the extent that the term "internationalization" (as discussed in the Introduction) implies a legal right of passage, it would be inaccurate to speak of these canals as being "internationalized."

The practice has also shown that in time of war, or in any situation short of war that presents a threat to the canal or to the interests of the canal-state, the riparian has not hesitated in placing restrictions on enemy and neutral vessels — both merchant and men-of-war — in accordance with the strategic and defence needs of that state. Nor have the canals been removed from the region of war. They have been fortified and defended by their riparians, and have been attacked by enemies. They cannot, then, be accurately described as being "neutralized."

Despite differences in their respective treaty arrangements, their practice has shown a marked degree of uniformity and consistency. In this sense, it has been argued that historical parallelism, to the extent that the practice of only three canals is a valid indicator, has accounted for the emergence of a common law of interoceanic canals based on their similar regimes of transit,[1] an implication recognized as early as 1923 by the Permanent Court in the Wimbledon case.[2] However, whether such a body of canal law has developed to a point where a fourth interoceanic canal would automatically upon its construction be governed by such a regime remains open to question.

The fundamental fact remains that interoceanic canals, being artificial waterways constructed within the territory of a state, are owned and operated by their territorial sovereigns and have not been subject to general international regulation as have international straits, where the right of passage developed through customary law as a corollary to the fundamental principle of the freedom of the seas. Hence, the owners of these canals can only be reasonably expected — from a legal and political standpoint — to place their own vital interests over any community considerations.

For The Future: An International Administration?

It is not unreasonable to argue that the function of interoceanic canals as vital international passageways is at once too significant and vulnerable to leave in the hands of their respective riparians. The discretion the sovereigns can exercise over their waterways combined with the demands imposed by their own national interests present a tempting and constant threat to the free and efficient use of these canals by the world community. The solution, the argument continues, would call for placing these canals — either as a group or individually — under some form of international administration or commission that would somehow remove from the proprietors their ability to unilaterally impede the free use of these waterways either by outright prohibition, discriminatory treatment, delaying tactics or by poor safety or maintenance standards.[3] Such an international body could range from one having a mere advisory or consultative role with no power to adjudicate, to one having total control or sovereignty over the waterway. Precedents for such a concept are found in the various international river commissions, such as the Central Commission of the Rhine[4] and the Straits Commission that formerly governed the Turkish Straits.[5] An effort was also made in the case of the Suez Canal when, after the nationalization of the Canal Company, France, the United Kingdom and the United States proposed an "international authority" to take over the operation of the Canal.[6] Not surprisingly, the plan was rejected by Egypt.[7] At the conclusion of the First London Conference another proposal was made for a "Suez Canal Board" on which Egypt and other interested states would serve, and which would be charged with "operating, maintaining, and developing the Canal, and enlarging it,[8] a plan also rejected by Egypt.[9] The Second London Conference then produced the "Suez Canal Users Association,"[10] whose purpose would be "to assist the members in the exercise of their rights as users of the Suez Canal," and "to promote safe, orderly, efficient and economic transit" through it.[11] The Association became little more than a consultative body for states using the Canal and a clearinghouse for information from shipping organizations.[12]

The failure of such efforts is not surprising. As regards international administration, canals present a more difficult framework upon which such an agency can be successfully imposed than do international rivers. To begin with, canals have a greater strategic and economic importance to the world community than international rivers. Consequently, the international body entrusted with its supervision or operation would be subject to considerably more pressure both from the international community and the riparian than would a river commission. More important, however, is the fact that each interoceanic canal is an artifical waterway constructed and owned by a single sovereign who views that waterway as a vital political, economic, and strategic resource, and who cannot be expected to turn over any aspect of that enterprise to foreign hands.[13] In the case of international rivers, there exists a reciprocity of interest among each riparian sharing the waterway which encourages each one to maintain its portion of the river in sound condition. Its own shipping would be prejudiced if the river were not kept fully navigable. This mutuality of interests is not present to such an extent in the case of interoceanic canals. Were the riparian of a river not to maintain its section adequately it could well result in retaliation by another riparian. This would be unlikely in the case of interoceanic canals, since neither Egypt, the United States, nor Germany are significant users of each other's canals.

Nevertheless, despite the more appropriate conditions for international administration of rivers, the history of these efforts has not been impressive. Though the Central Commission of the Rhine is still functional, most of the other European river commissions have ceased to exist. Neither was the existence of a commission a guarantee of immunity from political pressure or removal from the region of war. The First World War, for example, saw the closing of most of Europe's major rivers.[14] In fact, the activities of every European river commission have been either terminated or suspended by a war involving that particular river.[15]

It would appear that these commissions have been most successful in acting as consultative bodies coordinating matters of a technical nature, such as safety standards, rules of navigation, maintenance techniques, and the like. While such arrangements are feasible among various riparians sharing the same watercourse, it would hardly be convenient among three widely dispersed and physically distinct canals, each owned by a different sovereign.

Hence, the major difficulty with the concept of international administration - aside from the obvious question of wresting any form of control from the present sovereign - lies in the fact that the mere existence of such an agency, be it a "specialized agency" of the United Nations, a "subsidiary organ" of the General Assembly or a body comprised of the users of each waterway, cannot in itself remove the waterway from political pressures and conflicts. On the contrary, the creation of such a body (or bodies) could result instead in institutionalizing each crisis or conflict and thus providing a further level - in addition to the diplomatic one - on which the debate can take place. Moreover, the creation of such an institution cannot replace or provide a community of interest that is the essential foundation upon which a successful framework must be constructed.

There is room for the view, however, that the creation of a less sophisticated organization that would take into consideration the impediments mentioned above would be of some usefulness and success. Rather than an international organization that would attempt to remove any measure of control from the sovereign, a more regional organization could be created taking into account the specific purposes of each canal, and thus tailoring its powers and functions accordingly. Such an organization would function primarily to coordinate and harmonize the interests of the canal's users with those of the riparian and administrator. Unlike the heavy-handed and political nature of the Suez Canal Users Association which attempted unsuccessfully to impose demands of an administrative nature on an unwilling sovereign, this regional organization would function in essentially an advisory or consultative capacity, and major users outside of the region might also be represented perhaps on an alternating basis.

In this regard, the Panama Canal would appear the best suited to such a scheme. The predominant interest of Panama as riparian is to derive the greatest possible economic benefit from its resource. The United States as the administrator, and being heavily dependent on the use of the canal for its commercial and military vessels, has as its main purpose to maintain the security of the waterway and assure ready access for those vessels. The world community, and in particular the Latin American states, have an interest in maintaining reasonable rates and conditions of transit, both for their own vessels, and for those of states trading with them. Not only would there appear to be a need for coordinating these interests, but it would also appear that the political climate among the interested states in the region, including the United States, would provide a favourable framework for such cooperation. This is especially the case after the conclusion of new treaties regulating the Panama Canal which provide for the gradual "Panamization" of the waterway ending in the year 2000 when Panama assumes full control. These treaties received strong public support from the Latin American States, and it would not be unreasonable to assume that these states would look favourably on the prospect of some participation on their part - even if limited - in the defense of their own interests regarding that waterway, particularly in maintaining reasonable rates of transit. The United States, faced with the gradual loss of a waterway it constructed and will have managed for almost a century, and concerned with the matter of continued access after the year 2000, can only benefit from such participation. Panama may stand to benefit most from such an organization, particularly during the period of "Panamization," when recourse to a consultative agency - not only to assist Panama, but to perhaps provide a check on any tensions between the two administrating countries - would ease that period of transition. In all cases, the organization could serve all interests in providing for a smoother transfer of sovereign powers with minimal effects on the transit regime.

Even considering that such an organization would function only on a consultative basis, it could be argued that Panama, after finally concluding its 75-year ordeal for control over that waterway, will not wish at this time to share even this minimal aspect with any other nations, particularly through a formally-structured entity. However, it is quite possible that after Panama assumes some measure of actual control within the next decade, a more realistic assessment of its position will prevail that will place the idea of creating such an organization in a more attractive and feasible light.

A potential for the coordination of such interets would not appear to exist at this time in the case of the Suez or Kiel Canals. In both cases the sovereign and administrator are one and the same, thus eliminating the function of the user states as the balancing or harmonizing element. In the case of the Suez, the acrimony and devisiveness that characterizes the area would hardly provide a suitable foundation for such a regional agency.

When considering these impediments together with the rather disappointing performance of such agencies and commissions in the past, even in the case of international rivers where common riparian interests naturally exist, one is inclined to look for other alternatives. Perhaps one need not look far. As concluded in an earlier section[16], one can argue that on the basis of their similar constitutional foundations, state practice, and adjudication, the three major interoceanic canals are governed by an enlarging common body of law. It is not unrealistic to hope that the interplay between the dependence of the sovereigns on the revenues from these canals and the increasing demand by the world community for their unrestricted use at reasonable rates may well lead to the development of a more cohesive body of customary law which in turn could result in its eventual codification. Such a regime, growing out of custom and buttressed by the compatible needs of riparians and users alike, would provide far more assurance of unrestricted passage than one imposed on an unwilling sovereign. It is well and good to speak of the significance of these waterways and how their function must transcend the local interest of the riparian in favour of the greater international need. Such lofty arguments, however, cannot alter the basic principle of sovereignty upon which these canals were constructed and administered, and which remains to this day a fundamental principle of international law[17] and politics. It is submitted that, for the present, solutions to the question of interoceanic canals must be sought within this framework.

REFERENCES TO CONCLUSIONS

1. R.R. Baxter, The Law of International Waterways (Cambridge, Mass., 1964), pp. 185, 340-41.

2. P.C.I.J. Series A, No. 1 (1923).

3. President Truman at the 1945 Potsdam Conference made the suggestion that the Panama Canal as well as other international watercourses be made a free waterway under international regulation of its navigation, Truman, Year of Decision (New York, 1955), p. 377. However, when the matter was raised during the Suez crisis in 1956, Secretary of State Dulles replied that a careful search of Department of State records uncovered no such offer or proposal, News Conference Statement by Secretary of State Dulles, August 28, 1956, The Suez Canal Problem, U.S. Dept. of State Publication No. 6392 (Washington, D.C., 1956), p. 295.

   In 1960, Senator G. Aiken, on his return from a mission to Panama, proposed that one possible way out of the continuing conflict between Panama and the United States would be the "internationalization" of the Canal under U.N. or O.A.S. auspices, Report to the Senate Foreign Relations Committee, 86th Cong., 2nd Sess. (1960), p. 15.

   One commentator writes of the need to place the Panama Canal under an international authority "in order to save the world from another catastrophe," A. Maity, "The International Status of the Panama Canal," The Calcutta Review, Nov., 1952, p. 123.

4. See the Revised Convention for the Navigation of the Rhine (Act of Mannheim), Oct. 17, 1868, 20 Martens, N.R.G. (1875), p. 335.

5. See the Convention Relating to the Regime of the Straits (Treaty of Lausanne), July 24, 1923, 28 L.N.T.S., p. 115.

6. Tripartite Proposal for the Establishment of an International Authority for the Suez Canal, Aug. 5, 1956, The Suez Canal Problem, p. 44.

7. Statement by President Nasser, Aug. 12, 1956, ib., at pp. 50-51.

8. Five-Power Proposal, August 21, 1956, ib., at p. 291.

9. Letter from President Nasser to Prime Minister Menzies, Sept. 9, 1956, ib., at p. 319.

10. Declaration Providing for the Establishment of a Suez Canal Users Association, Sept. 21, 1956, ib., at p. 365.

11. Ib., art. 2.

12. Whiteman, Digest, Vol. 3, pp. 1106-08.

13. In August, 1956 the Panamanian Minister to Egypt defended Egypt's action in nationalizing the Suez Canal Company, and stated that Panama would never allow the Panama Canal to be placed under international control, *New York Times*, Aug. 21, 1956, p. 4. This latter position was also stated by the Panamanian Ambassador to the United Nations in a statement made to the General Assembly on October 28, 1976, *La Estrella de Panama*, Nov. 3, 1976, p. 2.

    It is interesting to note that during the decade-long negotiations between the United States and Panama that resulted in the signing in 1977 of two new treaties to govern the Panama Canal, the question of international administration of that waterway was never seriously considered by either party or advanced by other interested states.

14. E.g., the Scheldt, Lower Danube, Upper Danube, Elbe, Oder, Niemen, Vistula, Hackworth, *Digest*, Vol. 7 (1943), p. 473.

15. Baxter, *supra* note 1, at p. 147.

16. *Supra*, pp. 187-188.

17. See G. Schwarzenberger, *International Law*, 3rd ed., Vol. 1 (London, 1957), p. 11.

GENERAL CONCLUSIONS

The foregoing study has centered on an examination of international straits and interoceanic canals in an effort to determine the position of these important oceanic waterways vis-a-vis the international community. In the case of straits, the effort has centered on pointing out the uncertainties that have characterized this legal regime to the present time - particularly as regards the 1958 Convention on the territorial sea - and evaluating the recent efforts of the ongoing United Nations Conference on the Law of the Sea as it relates to straits. In the case of interoceanic canals, the inquiry has centered on determining whether the international community enjoys a legally enforceable right to the use of the Panama, Suez and Kiel Canals, based on the similar grants of passage to all nations contained in their respective treaty arrangements. In both cases, the inquiry has been prompted by the vital importance of these waterways to the international maritime community.

The right of passage through international straits, which exists in both the customary and positive law, was seen to be characterized by a number of vague and uncertain areas, particularly as regards the extent of control exercised by the coastal state over passing vessels. Due to the prevalence of the traditional 3-mile territorial sea and the minor threat posed by the vessels of the time, a minimum of controversy was generated. However, the impending extension of the territorial seas to 12 miles, together with the increasing threat both commercial and military vessels present to the coastal state, have made the issue a crucial one, since a 12-mile territorial sea will result in enclosing some 116 important straits within territorial waters. The relevant provisions of the Informal Composite Negotiating Text, the product of the recent efforts by the Law of the Sea Conference to draft a new charter for the oceans, were seen on the whole as a vast improvement over the 1958 Convention, but which still fail to strike a satisfactory balance between the need on the part of maritime interests for unimpeded passage and that of coastal states for protecting their resource and security interests. In an effort to arrive at a more satisfactory balance, the writer has suggested minimum changes that it is felt can be implemented within the structure of the present Negotiating Text. Barring such changes, there would be serious doubt as to the ultimate success of any new law of the sea.

In the case of interoceanic canals, the history, constitutional nature, and practice of the Suez, Panama, and Kiel Canals were examined in the face of a number of varying legal concepts. This examination failed to reveal the existence of a perfect and enforceable right of passage through these waterways in favour of the world community. Neither were they effectively removed from the region of war. Hence, they cannot be accurately referred to as either internationalized or neutralized. The international administration of these canals - either individually or as a group - was not seen as a practical or feasible arrangement. A more attractive alternative appeared to be a regional agency of an advisory character that could serve more to harmonize the various interests rather than actually manage the canal. However, the possibility that such an agency would actually be created at this time appeared remote. A more realistic forecast - in view of the argument made that these canals are governed by an increasing common body of law - was seen in the gradual development of a more cohesive body of customary law that could eventually result in codification, based on the increasing interplay between the dependence by the riparians on income from their canals and the need of user states for unrestricted passage at reasonable rates.

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